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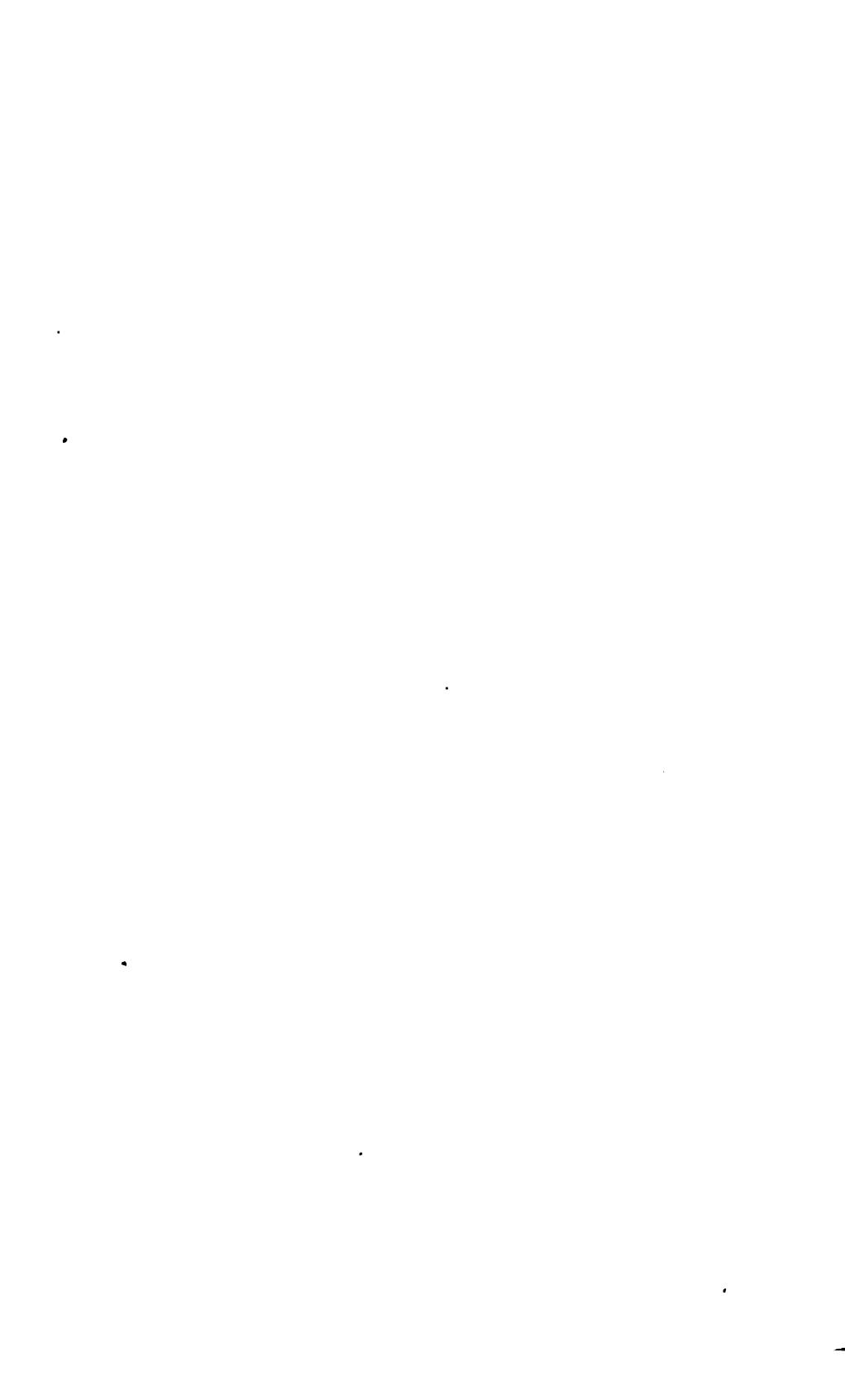
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# REPORTS OF CASES

DECIDED IN THE

## COURT OF APPEALS

OF THE

### STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF FEBRUARY 26, TO  
DECISIONS OF JUNE 4, 1907,

WITH

NOTES, REFERENCES AND INDEX.

C

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By EDWIN A. BEDELL,  
STATE REPORTER.

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VOLUME 188.

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1907.

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## JUDGES OF THE COURT OF APPEALS.

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**JOHN C. GRAY,**

**DENIS O'BRIEN,**

**EDWARD T. BARTLETT,**

**ALBERT HAIGHT,**

**IRVING G. VANN,**

**WILLIAM E. WERNER,**

**ASSOCIATE JUDGES.**

**WILLARD BARTLETT,**

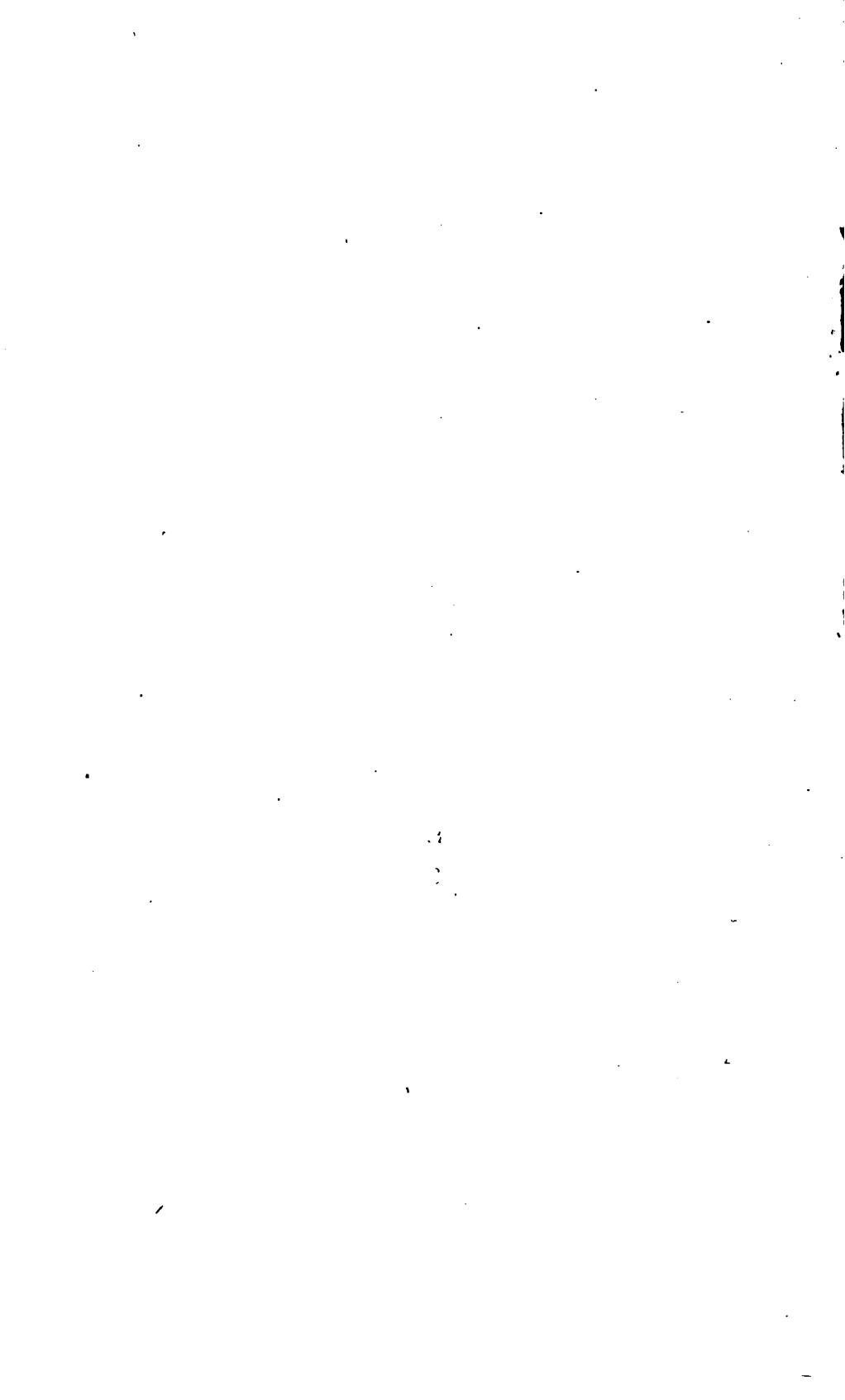
**FRANK H. HISCOCK,**

**EMORY A. CHASE,**

**JUSTICES OF THE SUPREME COURT SERVING AS ASSOCIATE  
JUDGES.\***

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\* Designated by the Governor January 8, 1906, under section 7 of article VI of the Constitution, as amended in 1899.



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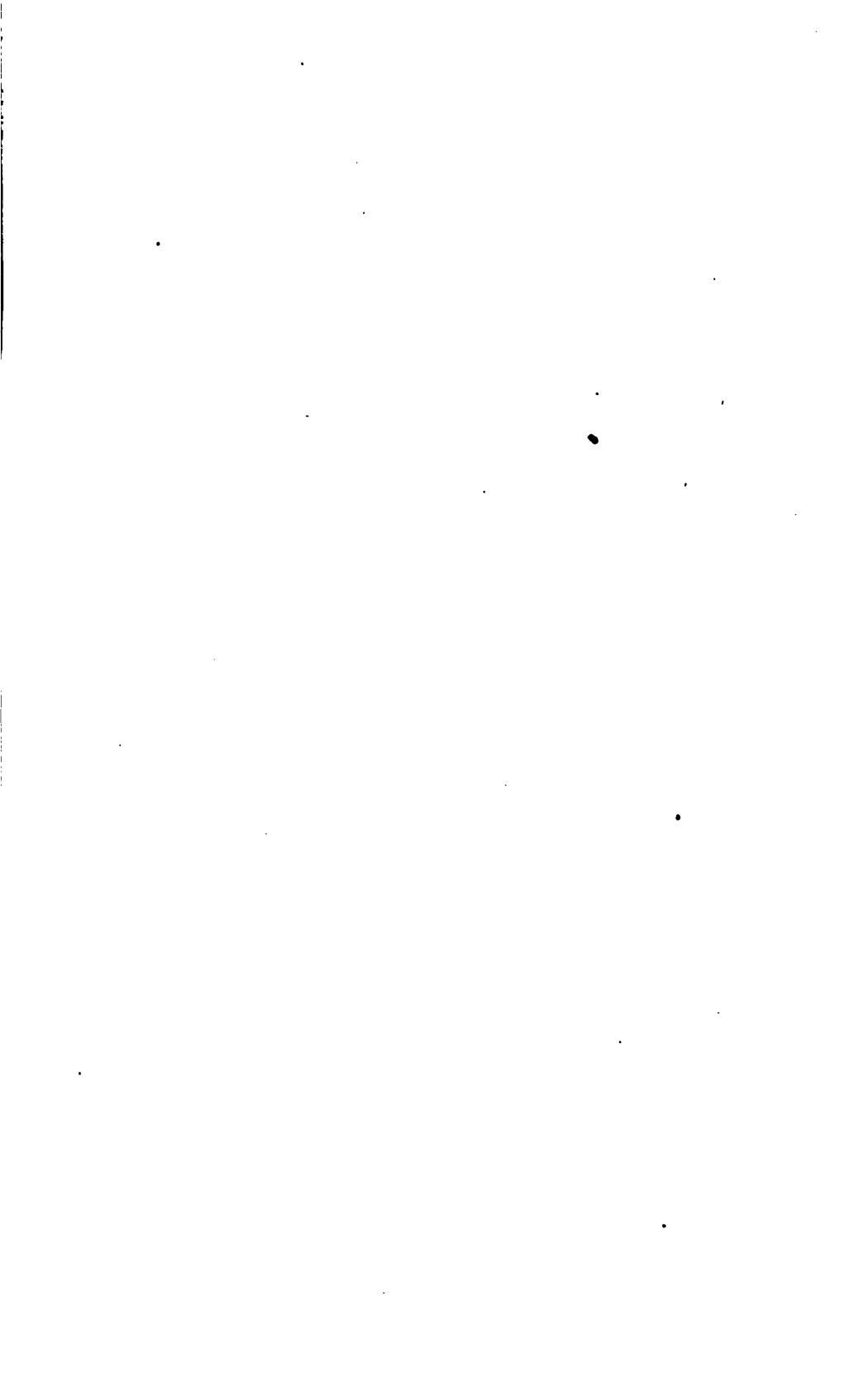
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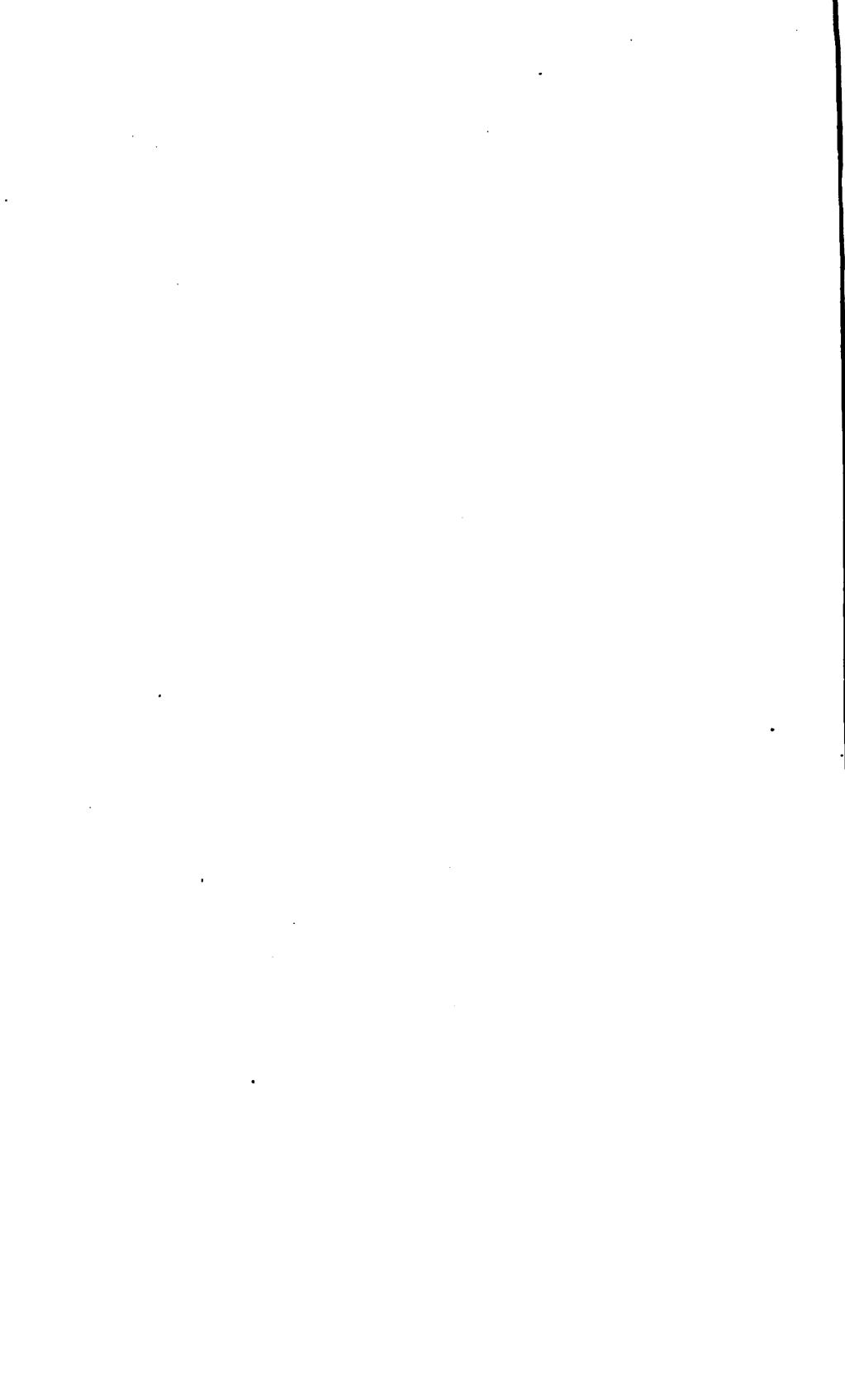
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## **ERRATA**

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In 187 N. Y. 420, in sixth line from top of page, instead of Code Crim. Proc., section 548, citation should be Penal Code, section 548.

In 187 N. Y. 443, in sixth line from bottom of page, reference to Code Crim. Proc. should read section 395, instead of section 198, as printed.



CASES DECIDED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW YORK,

COMMENCING FEBRUARY 26, 1907.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CITY OF GENEVA, Respondent, v. THE BOARD OF SUPERVISORS OF ONTARIO COUNTY, Appellant.

1. TAX — TAX IMPOSED UPON BANK STOCK UNDER SECTION 24 OF THE TAX LAW — ASSESSED VALUE OF STOCK OF BANK LOCATED IN TAX DISTRICT MUST BE INCLUDED IN AGGREGATE AMOUNT OF TAXABLE PROPERTY OF SUCH DISTRICT FOR PURPOSE OF FIXING AMOUNT OF GENERAL TAX TO BE LEVIED ON DISTRICT. Under the provisions of the Tax Law (L. 1896, ch. 908, § 24, as amd. by L. 1901, ch. 550; L. 1902, ch. 126, and L. 1903, ch. 237), "the rate of tax upon the shares of stock of banks and banking associations shall be one percentum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided," which "tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock," and which tax shall be collected by the board of supervisors of the county in which the bank or association is located, and be distributed by them among the tax districts of the county, including the district in which the bank is located, according to a rate to be ascertained in a manner prescribed in the statute; but there is no provision which authorizes or justifies the omission from the aggregate assessed valuation of a tax district for the purpose of fixing the amount of state and county taxes to be paid thereby, of the assessed value of the stock of such bank, which would be inequitable; and where there are two banks within a small city, which constitutes a tax district of a county, the same as a town, the assessed value of the stock of such banks must be included in the aggregate amount of taxable property of the city for

the purpose of fixing the amount of taxes to be levied upon the city by the board of supervisors.

2. TAX UPON BANK STOCKS, ALTHOUGH IN LIEU OF ALL OTHER TAXES, IS NOT EXCLUSIVELY FOR BENEFIT OF TAX DISTRICT WHEREIN BANK IS LOCATED. The tax upon bank stocks under section 24 of the Tax Law is not raised for local purposes and divided amongst the local tax districts for village or city, town or school purposes only; it is in lieu of all other taxes, expressly including state and county taxes, and there is no more reason for saying that it is exclusively raised on account of local purposes or interest than that it is raised exclusively on account of state and county purposes.

3. TAX UPON BANK STOCK IS NOT IN THE NATURE OF A LICENSE, BUT A TAX UPON PROPERTY. The contention that the tax imposed upon the stock of banks and banking associations under section 24 of the Tax Law is in the nature of a license for conducting the banking business and, therefore, like the license fees collected under the Liquor Tax Law, ought to be appropriated exclusively to the use and benefit of the district in which the bank is located, is untenable. The Liquor Tax Law plainly and explicitly imposes certain license fees upon the business of trafficking in liquor and provides for a distribution of the license fees thus collected. The Tax Law imposes a tax upon bank stock as property just as it does upon other species of property, and there is nothing in the nature of a license fee about it.

*People ex rel. City of Geneva v. Bd. of Supervisors*, 114 App. Div. 915, reversed.

(Argued January 8, 1907; decided February 26, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 19, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to issue to the relator a new certificate relative to the assessment and apportionment of taxes in the county of Ontario.

The facts, so far as material, are stated in the opinion.

*Frank Rice and A. L. Gardner* for appellant. The action of the board of supervisors was in accordance with the statute law of the state. (L. 1896, ch. 908, § 3; *People ex rel. N. S. Bank v. Peck*, 157 N. Y. 51; *City of Rochester v. Coe*, 25 App. Div. 300.) The course pursued by the board of supervisors was not only legal, but it was entirely just and equitable.

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N. Y. Rep.] Opinion of the Court, per Hiscock, J.

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(*Matter of Jenkins*, 47 App. Div. 404; *City of Utica v. Bd. of Suprs.*, 109 App. Div. 189.)

*W. Smith O'Brien* and *A. P. Rose* for respondent. The including of the assessed value of bank stocks, taxable under the provisions of section 24 of the Tax Law, in the taxable property of the municipality where such bank stocks are situate, for the purpose of determining the amount of state and county taxes to be apportioned to such municipality is contrary to the plain provisions of the statute and improper. (*People v. Gray*, 185 N. Y. 196; *People ex rel. Lawyer v. Supervisors*, 39 Misc. Rep. 164; *City of Utica v. Bd. of Suprs.*, 109 App. Div. 189.)

Hiscock, J. The city of Geneva is made a tax district the same as a town; but a warrant for the collection of state and county taxes is not issued by the board of supervisors to one of its officials as in the case of a town. Instead of this, said board having determined the amount to be raised for such taxes, in effect certifies the same to the proper authorities of the city, and the officials of the latter then collect said amount, which is returned to the proper officials for state and county purposes. The amount of taxes thus to be certified and raised in any year should bear the same proportion to the aggregate amount of such taxes to be raised throughout the entire county which the amount of taxable property within the city might bear to the aggregate amount of taxable property throughout the county. In the year involved there were located within the city of Geneva two banks, of which the capital stock was assessed at upwards of \$500,000. In fixing the proportion of state and county taxes to be collected and returned by the respondent the board of supervisors included in their estimate of taxable property such assessed valuation of said bank stock, and this inclusion increased the amount to be raised for the aforesaid purposes by the sum of \$1,211.31.

It is contended by the respondent and has been held by the learned courts below that on account of the special provisions

for the taxation of bank stock it was error for the board of supervisors to do as it did and that the value of said bank stock should not have been included in the amount of taxable property for the purpose of fixing the amount of taxes to be paid.

We think that this contention and such determination are erroneous.

It is undisputed, and, therefore, we need not quote or review all the statutory details upon that subject, that it was proper to place upon the assessment rolls for the city of Geneva the shares of bank stock in question and the valuation thereof assessed and determined in the manner provided by law.

It is also undisputed, and, therefore, again we may refrain from going into the details of statutes, that presumptively all of the taxable property, real and personal, in the city of Geneva should be taken into account in determining the proportion of taxes to be raised within that district. And finally, if respondent is right in its contention that the value of bank stock as spread upon its assessment rolls should be omitted and disregarded in determining the proportion and amount of state and county taxes to be raised, authority for this must be found in the statutory provisions especially relating to the taxation of such stock. We shall, therefore, refer to such of these as are regarded material.

Section 24 of the Tax Law (being chapter 24 of the General Laws) — L. 1896, ch. 908, section 24, as amended by L. 1901, ch. 550, L. 1902, ch. 126, L. 1903, ch. 267 — prescribes the method of fixing the value of stock in a bank or banking association, and then further provides: "The rate of tax upon the shares of stock of banks and banking associations shall be one per centum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided. \* \* \* The said tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock." Said section then, after providing for the collection of said tax under the supervision of the board of supervisors and wholly within the county where the bank

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N. Y. Rep.] Opinion of the Court, per Hiscock, J.

or association is located, further enacts: "The tax hereby imposed shall be distributed in the following manner: The board of supervisors of the several counties shall ascertain the tax rate of each of the several town, city, village, school and other tax districts in their counties respectively, in which the shares of stock of banks and banking associations shall be taxable, which tax rates shall include the proportion of state and county taxes levied in such districts, respectively, for the year for which the tax is imposed, and the proportion of the tax on bank stock to which each of said districts shall be respectively entitled shall be ascertained by taking such proportion of the tax upon the shares of stock of banks and banking associations, taxable in such districts respectively, under the provisions of this act as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which said shares of stock shall be taxable." It also provides that "In issuing their warrants to the collectors of taxes, the board of supervisors shall omit therefrom assessments of and taxes upon the shares of stock of banks and banking associations."

We do not find in these provisions or any others not specifically referred to when properly construed in connection with the general provisions for the assessment and collection of taxes for state and county purposes, anything which either explicitly or impliedly sustains the respondent's contention. We find, it is true, a special and arbitrary percentum of taxation imposed upon all bank stock at its assessed valuation, and that this is in lieu of all other taxes upon such stock; that the ordinary tax warrant shall not be carried out against it; also special machinery for the collection of this tax and special provision for its distribution, and certainly the city could not collect any additional taxes upon this property in direct response to the requisition of the board of supervisors. But we do not find anywhere any provision which satisfies us that in determining as between the city of Geneva and other towns in the county the proportion of taxes to be raised by the former for general purposes of state

and county the valuation of this species of property should not be taken into account. That is an entirely different proposition. In fact, the very provisions relied upon by the respondent seem to us to lead quite conclusively to an opposite conclusion than that urged in its behalf.

The tax levied upon the bank stock is "in lieu of all other taxes whatsoever for state, county or local purposes." Thus, it is a substitute or equivalent amongst other things for the state and county taxes which otherwise might and would be collected upon it just as they are levied upon other property. The existence of taxation for those purposes is recognized and the sum collected upon the bank stock is in part impressed with the character of an equivalent therefor. This certainly does not carry the idea that such stock should be excluded from view in considering the general subject of state and county taxes, but rather that the latter should be regarded as included in the one percentum raised in accordance with law.

The tax thus collected is to be turned back to the tax districts wherein the banks are situated, and in determining the respective amounts in which it shall thus be turned back "the proportion of state and county taxes levied in such districts respectively" must expressly be taken into account. Thus we have it that of the tax collected upon the stock of banks situated within its limits in lieu of or as a substitute for or on account of state and county taxes, the respondent has received a certain amount which bears direct relation and proportion to the amount of state and county taxes collected within its district. With this relation thus expressly established between state and county taxes and the tax upon the bank stock and the amount thereof to be turned over to the respondent, it would seem strange and quite inequitable if the connection should there end and the amount of state and county taxes to be paid by the city be determined between it and other localities without any reference to, but rather upon an exclusion of the value of the bank stock. This, as it seems to us, would result in the city receiving a certain amount of taxes collected upon the stock on account of state and county taxes and then

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N. Y. Rep.] Opinion of the Court, per Hiscock, J.

escaping all contribution to that very fund of taxes on account of which it had received something. The city would cultivate this particular species of taxable property as a source of local or private revenue and refuse to recognize it as a basis for any corresponding obligation common to all other tax districts and applicable to other kinds of taxable property.

It is not difficult to assume a case entirely within the bounds of reasonable probability which would illustrate the ends to which this doctrine would lead. A small town fortunate enough to have within its limits a bank with a capital stock of the assessed valuation of one million dollars, would receive the tax of \$10,000 collected thereon. This would be in lieu of state and county taxes which, except for the special provisions of law, would otherwise be collected upon such property and be appropriated to said uses. The town would then refuse to pay any state and county taxes based upon a valuation of property which included such bank stock. Thus, without any counter-balancing duty or obligation of uniting with the other towns in the county in raising a general tax, which took into account the bank stock, it would have secured a sufficient amount of taxes to enable it to meet its purely local charges and expenses. In the meantime the other towns in the county not fortunate enough to have within their limits banking capital would be contributing towards the payment of state and county taxes upon an apportionment which took into account all of the property within their limits, without reduction or relief by any contribution to such taxes by the first town on account of the bank stock. This result manifestly would not be equitable or just.

Upon the other hand, the course adopted by the defendant board of supervisors accomplishes substantial justice. It is urged that because direct state and county taxes could not be collected upon the bank stock, the inclusion of the value of such stock in the aggregate valuation of property within the city of Geneva by which to fix the amount of state and county taxes there to be raised, would result in imposing upon the other taxable property in that city an increased burden. This

is not so to any appreciable degree even in this particular case. As already stated, the inclusion of the bank stock in the taxable property of Geneva as a basis of computation increased the amount of state and county taxes by the sum of \$1,211.31. It is stated without dispute that the bank tax received by it on account of the proportion of state and county taxes amounts to \$981.92. After crediting this latter sum as may be done upon the amount of state and county taxes to be raised, the net increase in the amount of taxes to be raised because the bank stock had been considered would amount to only a little over \$200. If, as easily might happen, the percentage of state and county taxes had been a trifle larger in proportion to the entire tax rate for the city of Geneva, then the amount of the bank tax distributed to the latter on account of state and county taxes would have been greater than the increase complained of.

It remains to consider very briefly two propositions which have been urged either by the court or by counsel in support of the contention of the respondent. It was stated by the learned trial justice as a basis for his decision that "The tax upon bank stocks under this section (Sect. 24) is raised for local purposes and divided amongst the local tax districts for village or city, town or school purposes only." What we have already said sufficiently indicates our disagreement with the suggestion that this bank tax is raised for local purposes only. It is in lieu of all other taxes expressly including state and county taxes and we see no more reason for saying that it is exclusively raised on account of local purposes or interests than that it is raised exclusively on account of state and county purposes.

Upon his part the learned counsel for the respondent attempts to escape from the conclusion that the plaintiff ought to bear some burden of state and county taxes on account of the bank stock in view of the fact that it has received part of the taxes collected thereon in lieu of such taxes, by arguing that the bank tax is in the nature of a license for conducting the banking business, and, therefore, by analogy with the fees collected under the Liquor Tax Law ought to be appropriated

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N. Y. Rep.]Statement of case.

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exclusively to the use and benefit of the district wherein the bank is located. Our analysis does not disclose even a shadow upon which to base any such analogy. The Liquor Tax Law plainly and explicitly imposes certain license fees upon the business of trafficking in liquor and provides for a distribution of the license fees thus collected. The Tax Law imposes a tax upon bank stock as property just as it does upon other species of property, and there is nothing in the nature of a license fee about it. So that there is no opportunity for plaintiff to derive any assistance which might otherwise result from this comparison, however great or small that might be.

The orders of Appellate Division and Special Term appealed from should be reversed, with costs, and plaintiff's application for the writ of mandamus denied, with fifty dollars costs and disbursements in courts below, and with costs of this appeal.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WEEHER and WILLARD BARTLETT, JJ., concur.

Ordered accordingly.

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PEARL COANN, as Administrator with the Will Annexed of the Estate of MILTON WHITE, Deceased, Respondent, *v.* DANIEL D. CULVER, Appellant.

1. WILL — RESIDUARY LEGACY — DISCRETIONARY POWER OF SALE — WHEN ABSOLUTE TITLE TO RESIDUARY ESTATE VESTS IN RESIDUARY LEGATEES SUBJECT ONLY TO DISCRETIONARY POWER OF SALE CONFERRED UPON EXECUTOR. Where a testator, after making several pecuniary bequests, devised and bequeathed all the residue and remainder of his real and personal estate, in equal shares, to five persons named in his will, and then gave and devised all of his real and personal estate to the person named as his executor, in trust, for the payment of his debts and the legacies previously specified, with power to sell and dispose of the same in such manner and at such time or times as he should deem best for the interests of the estate, and directed him to pay the legacies in full in the order named in the will, the title to testator's property vested, upon his death, in the residuary legatees, subject only to the discretionary power of sale conferred upon the executor; and they, alone, are entitled to the rents and profits of lands owned by testator at the time of his death; the executor was not empowered to receive the rents and profits

## Statement of case.

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of the estate, nor was the power of sale imperative; he took no estate, but simply a power in trust to sell, discretionary in its exercise, as he might find it advisable to act, for the purpose of paying the debts of testator, if any, and the legacies in full in the order in which they were named.

2. SAME — WHEN EQUITABLE CONVERSION OF TESTATOR'S REALTY INTO PERSONALITY IS NOT CREATED BY EXPRESS TERMS OF WILL OR BY IMPLICATION — WHEN ADMINISTRATOR WITH WILL ANNEXED MAY NOT MAINTAIN ACTION FOR RENTS AND PROFITS OF LANDS OWNED BY TESTATOR. Where there is nothing in the will which, in express terms, commands a conversion of testator's real estate into personality as of the date of his death, and where upon the trial of an action, brought by the administrator with the will annexed, to compel a co-tenant of testator to account for and pay over the one-half part of the rents, income and profits received from a farm owned by such co-tenant and testator as tenants in common, no fact appears, or is found, which reveals any such situation at the time when the will was made as to support an implication that the testator intended such a conversion, such action cannot be maintained upon the grounds that the terms of the will had effected an equitable conversion of the testator's real estate into personality and "that the converted fund became personal assets in the hands of the executor," including the rents and profits of the interest in the farm, and went to the plaintiff as administrator with the will annexed.

*Coann v. Culver*, 108 App. Div. 380, reversed.

(Argued January 30, 1907; decided February 26, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 3, 1905, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

*David N. Salisbury* for appellant. The legal title to the lands was not vested by the will in the executor therein named since no valid trust was created. It passed to the residuary devisees, and carried with it to them the right to possession and to receive the rents and profits. (*Steinhardt v. Cunningham*, 130 N. Y. 292; *Bouton v. Thomas*, 46 Hun, 6; *Konvalinka v. Schlegel*, 104 N. Y. 125; *Cooke v. Platt*, 98 N. Y. 35; *Chamberlain v. Taylor*, 105 N. Y. 185; *Clift v. Moses*, 116 N. Y. 144; *Mellen v. Mellen*, 139 N. Y. 210; 60 Hun,

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151; *Mellen v. Banning*, 72 Hun, 176; *Parker v. Beer*, 65 App. Div. 598; 173 N. Y. 332; *Matter of Spears*, 89 Hun, 49.) To entitle Milton White's personal representatives to the rents and profits in question, his will must have effected an equitable conversion of such lands into money as of the date of his death. Such conversion was not established. (*Clift v. Moses*, 116 N. Y. 144; *Argall v. Pitts*, 78 N. Y. 242; *Lent v. Howard*, 89 N. Y. 169; *Asch v. Asch*, 18 Abb. [N. C.] 82; *White v. Howard*, 46 N. Y. 144; *Hobson v. Hale*, 95 N. Y. 588; *Scholle v. Scholle*, 113 N. Y. 261; *Matter of Cobb*, 14 Misc. Rep. 409; *Wright v. Trustees, etc.*, Hoff. Ch. 202.) The right to exercise the power of sale never vested in this plaintiff as administrator with the will annexed and he, therefore, derived no authority from it over the lands in question. (*Conklin v. Egerton*, 21 Wend. 430; 25 Wend. 224; *Franklin v. Osgood*, 14 Johns. 527; *Dominick v. Michael*, 4 Sandf. 374; *Roome v. Phillips*, 27 N. Y. 357; *Delaney v. McCormack*, 88 N. Y. 174; *Farrar v. McCue*, 89 N. Y. 139; *Eisner v. Curiel*, 2 App. Div. 522; *Cooke v. Platt*, 98 N. Y. 35; *Egerton v. Conklin*, 25 Wend. 224; *Dominick v. Michael*, 4 Sandf. 374; *Van Giesen v. Bridgford*, 83 N. Y. 348.)

*Sanford T. Church* for respondent. The administrator with the will annexed is entitled, as such, to the rents and profits of the real property in question. (Code Civ. Pro. § 2613.) The direction for the payment of the legacies constitutes a clear conversion of the realty into personalty, especially where, as in this case, the personal estate is insufficient to pay the debts and legacies. (*Dodge v. Pond*, 23 N. Y. 69; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Asch v. Asch*, 18 Abb. [N. C.] 82; *Salisbury v. Slade*, 160 N. Y. 278; *Mott v. Ackerman*, 92 N. Y. 539; *Greenland v. Waddell*, 116 N. Y. 663; *Bayne v. Mattison*, 54 N. Y. 663; *Royce v. Adams*, 123 N. Y. 402; *Ward v. Ward*, 105 N. Y. 68; *Lent v. Howard*, 89 N. Y. 169.)

GRAY, J. Milton White, in his lifetime, owned with the defendant, by tenancy in common, certain farm lands and this

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action was commenced by the plaintiff, as the administrator of White, with will annexed, to compel the defendant to account for, and to pay over, the one-half part of the rents, issues, income and profits received from the farm. Whether the plaintiff is entitled to maintain such an action, altogether, depends upon the terms of White's will. That instrument, in the first three of its clauses, after directing the payment of the testator's debts, gave pecuniary legacies to three persons. By the fourth clause the testator gave, devised and bequeathed all the rest, residue and remainder of his real and personal estate, in equal shares, to five cousins, naming them. The fifth clause then reads as follows: "I give and devise all my real and personal estate of what nature or kind soever, and wherever situate to Orange A. Eddy the executor of this my last will and testament, hereinafter nominated and appointed, in trust for the payment of my just debts and the legacies hereinbefore specified, with power to sell and dispose of the same at public or private sale, at such time or times, and upon such terms and in such manner, as to him shall seem meet and for the best interest of my estate; and I do hereby direct the payment of the legacies herein before named in full in the order herein named." By the subsequent provision of the will Eddy was appointed as executor. He died prior to the probate of the will and the testator, himself, had disappeared at some date prior to 1889. In November, 1889, the present plaintiff was appointed by the surrogate to be the temporary administrator of the estate and, upon an adjudication of White's death and the admission of his will to probate, received letters with the will annexed, in January, 1893. The referee, before whom this case was tried, gave judgment in favor of the plaintiff for one-half of the net profits of the farm; which the defendant had received from a certain date, when, under a written agreement, the farm was let by him, according to the referee's finding, to another to be worked on shares. His decision in favor of the plaintiff was based upon the conclusion that the terms of the will had effected an equitable conversion of the testator's real estate into personality and

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N. Y. Rep.]      Opinion of the Court, per GRAY, J.

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that "the converted fund became personal assets in the hands of the executor," including the rents and profits of the interest in the farm, and went to this plaintiff as administrator with the will annexed.

I think this conclusion was erroneous. In my opinion, under the provisions of this will the title to the testator's real and personal estate had vested in the five persons, to whom, in the fourth clause, he had given the residue and remainder of his estate; subject, only, to the exercise by the executor of the power of sale conferred upon him in the fifth clause. They, alone, were entitled to the rents and profits of the land and, if that be true, they, alone, were entitled to maintain such an action. It will be observed that none of the express trusts authorized by law was created by the terms of the fifth clause; for the gift in trust was for the payment of debts and legacies. The executor was not empowered to receive the rents and profits of the estate, nor was the power to sell imperative. He took no estate, but, simply, a power in trust to sell; discretionary in its exercise, as he might find it advisable to act. Our statutes, with the intent of restricting the cases where the vesting of titles may be suspended by trusts, have specified them and have provided for effect to be given to a testator's wishes, when directing other trusts, by validating his directions through powers in trust, when lawful. The persons, therefore, to whom White had devised his estate, were vested with the whole title thereto. It is not pretended that any charge upon the real estate in favor of the debts, or the legacies, was expressly created and the language of the will does not permit of the implication of any being intended.

That there was no equitable conversion of the real estate into personalty, as of the date of the testator's death, will be plain upon a consideration of the provisions of the will; to which the court is, wholly, confined. There is nothing in the will, which, in express terms, commands such a conversion and no fact appears, or is found, which reveals any such situation at the time when the will was made, as to support an implication that the testator so intended. The finding of the

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referee, that the personal estate was insufficient to pay the debts and the legacies, can only have reference to the date when the plaintiff was appointed administrator. The date of the making of the will does not appear in the record. If we should accept the date as it was stated upon the argument, it was in 1872, or some seventeen years before the appointment of the plaintiff as temporary administrator of the estate. Nor does it appear that any debts were left by the testator, or that any creditors ever presented claims against his estate. We have no fact, or circumstance, suggestive of any lack of personality at the time of the making of the testamentary dispositions. Confining ourselves, therefore, to the provisions of the will in order to discover the intention of the testator upon the subject, we find its provisions militate, in the most emphatic terms, against the idea of an equitable conversion of the whole estate into personality. The testator has devised and bequeathed the residue and remainder of his real and personal estate, absolutely, to five persons named. That indicates the existence of the idea that his personal estate might more than suffice for the payment of debts and legacies. Afterwards he gives to his executor his real and personal estate, in trust for the payment of debts and legacies, and a power of sale, which may be resorted to by the executor to supplement from the proceeds of a sale of the real estate any possible deficiency in personality, and he directs "the payment of the legacies herein named in full in the order herein named." The most rational interpretation of such a direction, in view of his previous gift of a residuary estate, is that if, when his estate came to be administered, the personality proved insufficient to meet all of the legacies, it was to be applied to their payment, in the order given, and then resort was to be had to a sale of the realty. If the provisions of this will evidence the existence of a belief by the testator that he would leave personality, ample for the payment of his debts and legacies, and that he was guarding against a possible insufficiency, by authorizing a sale of the real estate, it is plain that the amount, which would have to be sold would

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be problematical and this militates against the testator's intending a general conversion. A sale of the realty was not expressly directed and as nothing exhibits a situation where it might be inferred to have been intended, such a direction cannot be implied. The power to sell was, from every aspect of this will, purely discretionary with the person he appointed to be his executor.

My conclusion is that there was no change worked in the nature of the real property by equitable conversion and that it remained as such, until it was, in fact, sold under the power of sale. The will in the case of *Clift v. Moses*, (116 N. Y. 144), was not unlike this one in its provisions and the decision in that case bears quite closely upon the question we are considering. There the testator, first, directed the payment of his debts and gave certain legacies and then left to his daughter the residue of his real and personal estate. After these dispositions, he gave to his executors all his real and personal property for the purpose of paying his debts and the legacies named in his will; "giving them power to sell, mortgage or convey any and all real estate for the purposes above named." It was claimed that the real estate was converted into personalty for the purpose of paying the debts and legacies; but it was held that "the power of sale was left entirely discretionary with the executor" and that "there was no conversion until the executor exercised the power and consummated the sale." (See, also, *Matter of the Will of Fox*, 52 N. Y. 530, 537.)

There is, further, the objection that the plaintiff, being but an administrator with the will annexed, was without capacity to exercise the power of sale given by the will. Section 2613 of the Code of Civil Procedure, in providing that administrators with the will annexed, shall "have the rights and powers \* \* \* as if they had been named as executors in the will," will not apply where the power of sale is discretionary, but, only, when imperative. The power in this case was given to Orange A. Eddy, who is described as thereafter appointed to be executor. The power was not annexed to the office of

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executor; it was conferred upon a person selected by the testator, as a matter of personal confidence reposed in him. If the power was imperative in its nature, or was distinctively conferred upon the executor as such, it would then pass to an administrator with the will annexed. (*Mott v. Ackerman*, 92 N. Y. 539; *Cooke v. Platt*, 98 ib. 35.) The power being discretionary, whether, the donee having died, it survived in the Supreme Court and could be executed, if necessary, by its appointee for the purpose, it is unnecessary for us to decide at present. The question may be an open one. (See *Cooke v. Platt, supra*; *Royce v. Adams*, 123 N. Y. 402, 405.) The right to maintain an action of this nature against this defendant resided, only, in those persons, in whom the legal title to the lands had vested. The sole purpose of the action, as disclosed by this complaint, is to enforce against him a liability to account for the half of the rents and profits, which he had received under the agreement for the working of the farm lands.

The conclusion reached renders it unnecessary to consider the other questions raised, as to the construction of the agreement which the defendant made for the working of the farm. Whether it was, as the referee appears to have found, a lease thereof, under which a third person was in possession paying rent, or profits, or whether the defendant remained in possession thereof and farmed it through an employé, might be a debatable question.

For the reasons given, I advise the reversal of the judgment appealed from and that a new trial be ordered, with costs to abide the event.

CULLEN, Ch. J., HAIGHT, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment reversed, etc.

WILLIAM T. HOLT, as Administrator with the Will Annexed of the Estate of MARGARET GALLAGHER, Deceased, Respondent, *v.* THOMAS W. TUITE, Individually and as Administrator of the Estate of BRIDGET DITTON, Deceased, et al., Appellants.

DECEDENT'S ESTATE—ORAL CONTRACT OF DECEDENT TO GIVE ALL OF HER PROPERTY TO CERTAIN PERSON—EVIDENCE—WHEN INSUFFICIENT TO ESTABLISH CONTRACT. In an action brought against the administrator of an estate to compel the specific performance of a contract alleged to have been made between the decedent and the plaintiff, while an infant, whereby the former agreed that upon her death all of her property should pass to the latter in consideration, during the former's life, of the companionship of the latter and the assumption of a child's duties, and the performance of certain other services by the latter, which contract was claimed to have been fully executed by the plaintiff, the burden of proof rests upon the plaintiff to establish by the most convincing evidence that the contract was actually made; and where the only evidence that there ever was any such contract—outside of the fact that plaintiff, when five years of age, was taken from an infants' home or asylum by decedent, with whom she lived as one of decedent's family until her marriage—consists solely of the testimony of certain witnesses of statements or admissions alleged to have been made by decedent relative to the alleged contract at various times, ranging from six to twenty-five years before the trial, assuming that the witnesses were entirely impartial and able to repeat with exact precision what decedent said, and such evidence falls far short of establishing that at some time decedent made with the child a specific contract whereby she bound up the disposition of all her property, present or future, for the consideration alleged, a judgment in favor of plaintiff based solely upon the ground of an express contract cannot be sustained.

*Gallagher v. Tuite*, 110 App. Div. 915, reversed.

(Argued January 22, 1907; decided February 26, 1907.)

APPEAL from a final judgment entered May 21, 1906, upon an order of the Appellate Division of the Supreme Court in the second judicial department affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

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from that of those who had assumed her care. She had some schooling and when later for a period of four years she worked out she brought her wages home to Bridget.

After moving away with her husband she maintained friendly relations with Mrs. Ditton and was with her at and for some time prior to her death.

Passing beyond these general surroundings, there is no direct evidence of the alleged contract of which enforcement has been sought and allowed. It is not claimed that there was any written contract or that the public authorities or any other adult acted in behalf of the infant in making the alleged contract. Outside of the facts already referred to the evidence that there ever was any such contract consists solely in the testimony by certain witnesses of statements or admissions alleged to have been made by Bridget Ditton and which have been supposed to establish the existence and details of the contract.

I shall refer to this testimony somewhat at length, and again shall quote almost entirely the expressions of the learned trial justice, this time as found in his opinion. In reviewing and summarizing this testimony, he states as follows: "She (Mrs. Ditton) said to Lynch (one of the witnesses) 'This is the little girl I have taken out of the home; me and Tom are going to adopt her.' To Dempsey (another witness) she said: 'What work Margaret did, she did for herself; that when she died everything belonged to Margaret Ditton, her daughter. This happened a dozen times. That she had no child but Margaret Ditton and that when she died everything belonged to her; that is why she made her will.' She also told Lynch, 'After I am gone everything will belong to her and the harder she works the more she will have.' She told the witness Hart that Maggie was working for herself and not for her. Just before Mrs. Ditton was taken sick she had Margaret there and she wanted her to attend her and stay there; asked her forgiveness, that if she would forgive her she would die happy and that whatever was left was hers. Mrs. Ditton said that she had not used her right and had wronged

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not sustained upon the trial, and judgment was awarded in favor of the plaintiff solely upon the theory of an express contract.

We find ourselves unable to concur in the disposition which thus far has been made of this case and think that within rules now well established by this court as applicable to actions of this character the judgment should be reversed.

Certain facts and incidents which in a general way are claimed to support plaintiff's contentions were established upon the trial without any particular criticism or doubt, and I shall cite these somewhat at length from the findings of the learned trial justice.

Margaret Gallagher, under the name of Margaret Harmon, and being then an infant about four years of age of unknown parents, sometime prior to July 22, 1872, was committed by the department of public charities of the city of New York to Randall's Island Asylums, Schools and Infants' Hospital. Upon the date mentioned and again one year later, being then five years old, she was discharged by the public authorities to Bridget Ditton, who was a married woman 35 or 40 years old having a living husband, and up to that time and thereafter childless. The child continued to live with Bridget and her husband until the death of the latter in 1891, and thereafter until her marriage, with Bridget alone. After her marriage she went elsewhere with her husband for a few years, but otherwise continued to live in a tenement house on the Ditton lot until the death of Bridget in 1900. Until she was married she was known as Maggie Ditton. She was confirmed under that name and as a prerequisite of such confirmation and rather at the suggestion of the priest than otherwise, was baptized in the same name. She was married from Bridget Ditton's house and her child was spoken of by the latter as a grandchild. The Dittons were in humble circumstances and engaged in the milk business, and Margaret, until her marriage, served them faithfully and laboriously, doing various kinds of work in connection with the milk business, and having poor clothes and various hardships, but leading a life no different

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we are to determine the weight and force of the evidence and facts which have been recapitulated. Those rules must be reasonably familiar, for recently they have been formulated by this court after much consideration and with deliberation. They have emphasized with increasing decisiveness the caution with which claims of the class to which the present one belongs must be scrutinized and the high order of proof by which they must be sustained. The court has felt compelled to do this by the frequency with which such claims were arising and in view of the dangerous opportunities afforded through them of fraudulently sweeping the property of a dead person away from those to whom it would naturally pass. These rules must be general in their application and may not be too much shifted in any particular case to meet the necessities and equities, real or fancied, of that particular case.

In *Shakespeare v. Markham* (72 N. Y. 400, 403) it was said that such contracts "are properly regarded with grave suspicion by courts of justice and should be closely scrutinized, and only allowed to stand when established by the strongest evidence."

In *Hamlin v. Stevens* (177 N. Y. 39, 48) it was said: "While such contracts are sometimes enforced by the courts, it is only when they have been established by evidence so strong and clear as to leave no doubt and when the results of enforcing them would not be inequitable or unjust."

In *Rousseau v. Rouss* (180 N. Y. 116, 120), in speaking of an alleged contract sustained by many equitable circumstances and directly testified to by one interested witness who was corroborated by three witnesses testifying to admissions made by the decedent to the effect that he had made a contract resembling the one sworn to, the court said: "Thus, the evidence relied upon to establish the contract is, *first*, the testimony of the mother, who tried to swear \$100,000 into the pocket of her own child, and, *second*, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous; the latter is weak, and neither should

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be acted upon without great caution. We have repeatedly held that such a contract must not only be certain and definite and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence \* \* \*. We have been rigid and exacting as to the sufficiency of the evidence to establish them (such contracts) and have condemned the proof thereof ‘through parol evidence given by interested witnesses,’ as ‘such contracts are easily fabricated and hard to disprove because the sole contracting party on one side is always dead when the question arises,’ we have declared that they ‘should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses.’”

When the evidence in this case is measured by the tests thus prescribed, I think that it not only does not square with them, but that it is unusually deficient.

While it may be conceded that such a contract as is claimed might have been equitable enough after the husband died and as against the present defendants still there is no overwhelming balance in favor of Mrs. Gallagher’s equitable claim to such a contract. While she is entitled to credit for having been dutiful, she secured in the place of parents who had abandoned her, guardians who were apparently respectable and who fairly shared with her their means and support as well as their hardships. She exchanged a charitable asylum for a home where she was at least free from the dangers incident to girlhood, and where she was absolutely welcome to stay as long as she desired, and in the end she secured property which formed a considerable portion of all of that which had been accumulated by Mrs. Ditton.

But, conceding that equitable considerations would have been satisfied by a disposition of all of the decedent’s property, the burden still rested upon the plaintiff to establish that in fact a contract was made providing for such disposition. The mere fact that equity would justify such a contract will not satisfy the necessity of proving that such contract in fact

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was made. And it is on this point that plaintiff's case, as I regard it, is fatally weak.

I am uncertain just when the contract is supposed to have been made. The complaint alleged that it was made by the public officials at the time the infant was delivered to Mrs. Ditton, but no such allegation was sustained upon the trial, and the findings are silent upon this point. But necessarily, in order to make it valid, the contract must be assumed to have been made with the child at or soon after the time when she went to live with Mrs. Ditton and before she did the various things which are claimed to have been done upon the faith of it. Contrary to the usual rule, no adult in behalf of the infant was a party to or vouched for the execution by her of the contract. Thus we have an unilateral contract of the most pronounced character, whereby Mrs. Ditton absolutely relinquished any general right of disposition of her property even in favor of her husband, in consideration of a promise by a mere infant which could not be enforced. No written instrument of the most informal kind evidenced what this contract was. No outsider was present and no one purports to state in a comprehensive and definite way what the alleged agreement was. Instead of this, we are relegated for proof to alleged statements made at dates ranging from six to twenty-five years before they were testified to, not carefully and deliberately on some occasion of importance, but without consideration in the course of informal and impromptu talks with neighbors and familiars.

Some of the witnesses who have detailed these talks do not appear in an entirely unprejudiced attitude; but assuming that they are entirely impartial and that without any apparent cause for it they have been able after years to repeat with exact precision what the dead woman said, still I fail to find any sufficient proof of the alleged contract. I find evidence upon the assumption indulged in which would justify the conclusion that the dead woman intended to adopt the girl, and that she desired or expected or believed that upon her death everything would belong to the child. She may have

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harbored the unfounded belief that the child was legally adopted and would inherit all of her property, but all of this is far away from plaintiff's theory and falls far short of establishing that at some time the woman made with the child a specific contract whereby she bound up the disposition of all of her property, present and future, to the latter in consideration of a promise to do the various things which the girl is said subsequently to have done.

The many cases cited by the learned counsel for the respondent to our attention for the purpose of leading us to a different conclusion have not been overlooked. It is not possible within reasonable limits to analyze and distinguish all of them, but a word may be said with reference to two in this court which seem to be relied upon. In *Winne v. Winne* (166 N. Y. 263) there was a written contract, and this having been lost, parol evidence of its contents was admitted which was regarded as satisfactorily establishing the lost instrument. In *Healy v. Healy* (166 N. Y. 624) this court was confronted by a unanimous decision in the Appellate Division which prohibited it from considering questions which in this case are open to us.

The judgment should be reversed and a new trial granted, with costs to abide event.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT and CHASE, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment reversed, etc.

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**ANNA M. IRWIN et al., Individually and as Executrices of  
JACOB V. B. TELLER, Deceased, Appellants, v. DAVID  
TELLER et al., Respondents.**

**1. WILL — WHEN LEGACY CHARGEABLE UPON REAL ESTATE ACQUIRED  
AFTER EXECUTION OF WILL.** A will operates from the time of the testator's death, and the real estate owned by him at that time, although acquired after the execution of his will, is chargeable with the payment of legacies that are a lien upon realty, especially where the provision of the will charging the payment of legacies upon his real estate is restated

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and republished in a codicil thereto, after the acquisition of the real estate not owned at the time of the execution of the will.

**2. WILL — CONSTRUCTION OF PROVISION FOR ANNUITY AND LEGACY TO BE PAID BY RESIDUARY LEGATEE, WHEN CHARGEABLE UPON REAL ESTATE.** A testator, who had at the time of the execution of his will no personal property except furniture and other household goods which he bequeathed to his wife absolutely, devised and bequeathed all of his property to his wife for her use and benefit during her life; upon her death he devised certain farms to two of his sons, subject to an annuity to be paid to a third son in his lifetime, and legacies to be paid to the next of kin of such son after his death; the residue and remainder of his property testator devised and bequeathed to his two daughters, subject to the payment by each of them of a certain annuity to his third son, directing each of them to set apart, out of the personal property bequeathed to her, a sum large enough to produce the prescribed annuity and hold the same in trust to pay the annuity from the income thereof, any deficiency to be made up out of her own means, but not to be a charge upon her property, and upon the death of such son to pay over and transfer such annuity fund to his next of kin; testator died possessed of no personal property and none came into the possession of his daughters under the residuary clause of the will, so that they were unable to set apart the annuity trust funds as directed and there never was such a fund in their hands, but they paid, during the lifetime of the brother, the annuity to which he was entitled; the only property which passed to the daughters under the residuary clause was four lots or parcels of land the value of which is not proved, one of which was subject to a mortgage. *Held*, that the two legacies — consisting of the amount of the two trust funds which testator directed his daughters to set apart to produce the annuity for his third son — are chargeable upon the real estate devised to them by the residuary clause of the will; since it is apparent, from the provisions of the will construed in the light of the extrinsic circumstances, that such was the intention of the testator.

*Irwin v. Teller*, 115 App. Div. 17, affirmed.

(Argued January 24, 1907; decided February 26, 1907.)

**APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered September 25, 1906, affirming a judgment of Special Term construing the will of Jacob V. B. Teller, deceased.**

The following facts, among others, were found by the trial court: Jacob V. B. Teller died in the town of East Greenbush, Rensselaer county, on the 6th of February, 1892, leaving him surviving his widow, Martha T. Teller, two daughters,

Anna M. Irwin and Margaret M. Strong, and three sons, David A., William and Elisha P., as his sole surviving heirs at law and next of kin.

Jacob V. B. Teller on the 26th of January, 1885, made his last will and testament; on October 13th, 1888, a first codicil, and on November 13th, 1890, a second codicil. The will and codicils were duly admitted to probate on the 16th of November, 1892, and letters testamentary were granted to his daughters Anna M. and Margaret M., who duly qualified: No inventory was made of the personal estate of the testator.

The twenty-fifth finding reads as follows: "That at the time when testator made his will, namely, January 26th, 1885, he had no money or other personal property which could be set apart by either of his said daughters, as provided by said will, for the payment to Elisha or to his children in case of his death, and that he had no personal property at that time." The seventh finding reads as follows: "That Jacob V. B. Teller left no personal property at the time of his death, except household furniture, pictures, wearing apparel and books, which were by said will bequeathed absolutely to his wife, and that no personal property came into the possession of Anna M. Irwin and Margaret M. Strong or either of them, either as legatees or executrices of the last will and testament of Jacob V. B. Teller, deceased."

It is further found that the testator died seized in fee and possessed of the following real estate: Property known as numbers 51 and 59 Hudson avenue and certain property on Hawk street, all located in the city of Albany, N. Y.; also certain farm lands in the town of East Greenbush, Rensselaer county; also property located in the village of Greenbush, now a part of the city of Rensselaer. The testator died seized of no other real property.

The will provided for his wife as follows: "I give, devise and bequeath to my beloved wife, Martha T. Teller, all my property of every description, both real and personal, for and during the term of her natural life, to receive and apply to her own use and enjoyment all of the income thereof and so

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much of the principal as she may see fit, giving her full power to sell and convey all or any portion of my real estate. Upon her death I give, devise and bequeath my said property both real and personal, or so much as then remains thereof, as follows, believing that she will not sell my farm below mentioned."

The testator devised to his son William his farm in the town of East Greenbush, formerly belonging to William's grandfather, and being the same as owned by testator's brother Tobias at the time of his death. He also devised to his son David that portion of his homestead farm in the town of East Greenbush and fully described in the will, except eighty-seven acres more or less, disposed of as follows: "I give and bequeath one undivided third thereof to my son William in fee; one undivided third thereof to my son David in fee, and the remaining undivided third thereof to my said sons, William and David, in trust nevertheless, as trustees, to receive the rents, issues and profits thereof and apply the same to the use of my son, Elisha P. Teller, during his life by paying the same to him semi-annually; and on his death I devise such one-third, or the proceeds of sale thereof in case it shall have been sold, to his heirs at law." Then follow other provisions of the will not material at this time.

The will contains a residuary clause in favor of the daughters Margaret and Anna, the plaintiffs in this action; also certain provisions bearing upon the annual payments to Elisha and the final payment to his next of kin. The residuary clause as to the daughters reads as follows: "All the rest and residue of my real and personal property, I devise and bequeath upon my wife's decease to my daughters, Margaret M. Strong and Anna M. Irwin, share and share alike, subject to said payment to their brother William, and subject also to the payment by each of them of the sum of \$125.00 a year to my son, Elisha P. Teller, during his life, in half yearly payments, and in order to secure such payment I direct that each of them shall set apart out of the personal property hereby bequeathed to her the sum of \$2500.00 and invest

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the same, and hold it in trust and pay the income thereof to the amount of \$125.00 a year to said Elisha, and if there be any deficiency in the income she shall make up what it falls short of such amount of \$125.00 out of her own means, and shall not be entitled to commissions or compensation as trustee, but payment of such deficiency shall be only a personal debt to Elisha and not a charge upon her property. \* \* \* In the case of the trust funds directed to be held by each of my daughters for said Elisha, such funds shall on the death of said Elisha be paid over and transferred to his next of kin."

The will contains in this residuary clause certain provisions relating to the payments to be made to Elisha, and after his death to his next of kin that are immaterial at this time.

The first codicil refers to a matter between David and William not material; the second codicil reduces the annual payment to be made by the children of testator to Elisha to \$75.00 a year.

It is found that the farms devised, respectively, to the sons William and David were subsequently conveyed to them by the testator.

The twenty-sixth finding reads as follows: "That from the time of the death of the testator the legacy of \$75.00 a year was paid to Elisha by Margaret M. Strong and Anna M. Irwin out of their own property." The twenty-seventh finding reads: "That for some time prior to the death of Elisha the \$75.00 a year directed by the will to be paid by Margaret M. Strong and Anna M. Irwin to Elisha, was paid by them to Elisha's wife, and that this was paid by them out of the estate of William Teller." The twenty-eighth finding reads: "That the premises in this report described as 59 Hudson avenue were devised to Anna M. Irwin and Margaret M. Strong, subject to a mortgage of \$3,000."

Martha T. Teller, the widow of testator, died July 6th, 1893.

*Murray Downs* for appellants. The plaintiffs hold the real estate devised to them free from any lien because the lan-

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guage of the will does not charge such real estate with the payment of the legacies, but expressly declares that such legacies and annuities are to be paid out of the "personal property hereby bequeathed." (*Morris v. Sickly*, 133 N. Y. 456; *Van Nostrand v. Moore*, 52 N. Y. 18; *Wadsworth v. Murray*, 161 N. Y. 284; *Brill v. Wright*, 112 N. Y. 129; *Washbon v. Cope*, 144 N. Y. 297.)

*John A. Stephens* for respondents. The legacy of \$2,500 directed to be paid by each of his daughters, Anna M. Irwin and Margaret M. Strong, to the next of kin of Elisha on his death, was a charge upon the real estate of decedent, devised to said daughters. (*Brill v. Wright*, 112 N. Y. 129; *Briggs v. Carroll*, 117 N. Y. 288; *McCoen v. McCoen*, 100 N. Y. 511; *Hoyt v. Hoyt*, 85 N. Y. 147; *Matter of James*, 146 N. Y. 78; *Stokes v. Weston*, 142 N. Y. 433; *Roe v. Vingut*, 117 N. Y. 212; *Tilden v. Green*, 130 N. Y. 152; *Byrnes v. Stillwell*, 103 N. Y. 458; *Fothergill v. Fothergill*, 80 Hun, 316.) The making of each codicil was a republication of the whole will; the provisions of the former could be treated as if embodied in the latter, and both as if executed and published at the same time. (*Kip v. Van Cortland*, 7 Hill, 346; *Van Alstyne v. Van Alstyne*, 28 N. Y. 375; *Caulfield v. Caulfield*, 85 N. Y. 153; *Moffett v. Elmendorf*, 82 Hun, 470.)

EDWARD T. BARTLETT, J. This litigation arises over the will of Jacob V. B. Teller, late of the village of East Greenbush, now city of Rensselaer, Rensselaer county, and certain extrinsic circumstances. The will and the findings are lengthy, but the facts material to this controversy are exceedingly simple. This action was brought by the two daughters of the testator and asks for a judgment determining the rights of the parties in and to the property, real and personal, disposed of by the will.

The testator died leaving five children, the two plaintiffs, and three sons, David, William and Elisha, seized of what is

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known as the Rensselaer county farm property, a lot in the city of Rensselaer, and certain real estate in the city of Albany. The farm property was devised and afterwards conveyed to William and David, subject to a certain annuity to be paid to Elisha in his lifetime and legacies to be paid to his next of kin after his death.

The testator, by the residuary clause of his will, bequeathed and devised to his two daughters by a general provision the residue of his personal property and real estate. The effect of this disposition was to vest in the daughters the testator's personal property, if any, the lot in the city of Rensselaer (formerly the village of Greenbush), and three parcels of real estate in the city of Albany, consisting of certain premises in Hawk street and numbers 51 and 59 Hudson avenue. The values of this real estate were neither proved nor found. The only finding having any bearing whatever upon the value is to the effect that 59 Hudson avenue was devised to the plaintiffs, subject to a mortgage of \$3,000. It is found that the testator was possessed of no personal property whatever either at the time of making the will or at his death.

This appeal presents the single question whether the two legacies of \$2,500.00 each, payable by the daughters of the testator (the plaintiffs in this action) to the next of kin of Elisha after his death, are chargeable on the real estate devised to them by the residuary clause of the will.

It is found that since the testator's death in February, 1892, the plaintiffs have paid the annuity of \$75.00 a year out of their own property; it is also inconsistently found that for some time prior to the death of Elisha the \$75.00 a year was paid by the plaintiffs to Elisha's wife out of the estate of William Teller. Under the residuary clause of the will this annuity was \$125.00 a year, but it was cut down to \$75.00 by the second codicil executed on the 13th of November, 1890.

A preliminary point is made by plaintiffs appellants that certain real estate purchased by the testator after the execution of his will and devised to them, cannot be made charge-

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able with the payment of these legacies even if the real estate held at the time of the execution of the will is subjected to this lien. A will speaks from the time of the testator's death, and the real estate owned by him at that time is chargeable with the payment of legacies that are a lien upon realty. It is to be remarked that at the time of the execution of the second codicil the testator was the owner of all the real estate of which he died seized. The codicil was a re-execution and re-publication of the original will, and is a further answer to this preliminary point.

However improbable it may seem that the testator died possessed of no personal property, in view of the elaborate provisions of the will based on the assumption that his estate was made up in part of personality, and the additional fact that he purchased more real estate after the execution of the will, nevertheless we are bound by the finding, unanimously affirmed by the Appellate Division, that he was possessed of no personal property, either when executing the will or at the time of his death.

Starting out with these findings, the conclusion follows under the settled law of this state that these legacies are a charge upon the real estate of the plaintiffs devised to them by the testator. In *Brill v. Wright* (112 N. Y. 129) this question was thoroughly discussed by ANDREWS, J. The learned judge says: "Where in a will general legacies are given, followed by a gift of all the rest and residue of the real and personal property of the testator, by a residuary clause in the usual form and nothing more, it must now, we think, be regarded as the established rule in this state that the language of the will alone unaided by extrinsic circumstances is insufficient to charge the legacies upon lands included in the residuary devise. \* \* \* The cases of *Wiltsie v. Shaw* (100 N. Y. 191) and *McCorm v. McCorm* (100 N. Y. 511) illustrate very clearly the attitude of this court upon the subject. Both were cases substantially of wills giving general legacies, followed by the usual residuary clause. In each the question was whether the legacies were charged on

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the lands. In *Wiltzie v. Shaw* it appears that the testator left a large personal estate, ample for the payment of debts and legacies, and no other circumstances appearing, it was held that a legacy given by the testator in his will, in trust for a son, was not a charge on the lands, which passed to the testator's daughter under the residuary clause. In *McCorm v. McCorm* the legatees were the wife and son of the testator, and the gift of the legacies was followed by the usual residuary clause, under which all the testator's real estate passed to four other children. It appeared that the will was made the day before the testator's death, and that his personal estate was insufficient to pay his funeral expenses. The legacies to the testator's wife and son were mere pretenses, 'unless meant to be a charge on the real estate.' Under these circumstances the court held that the legacies were intended to be charged on the realty, and sustained the claim of the legatees. We think the cases in this state establish these two propositions: *First*. That general language in a will giving legacies, followed by the usual residuary clause, is alone insufficient to charge the legacies on the realty; and, *second*, that such language will justify such charge if it is made to appear by extrinsic circumstances, such as may under the rules of law be resorted to, to aid in the interpretation of written instruments, that it was the testator's intention that the legacies should be charged on the land."

In *Hoyt v. Hoyt* (85 N. Y. 142) it was held that legacies may be charged upon real estate without express direction, if the intention of the testator so to do can be fairly gathered from the provisions of the will; and extrinsic circumstances may be considered in aid of the terms of the will. FOLGER, J. (at page 147), states: "It is assumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. Hence, when from the provisions of a will prior to the gift of legacies it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is rea-

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sioned that the bare fact of giving a legacy indicates an intention that it shall be met from real estate. So it was reasoned in *Goodard v. Pomeroy* (36 Barb. 546-556). Courts have been urged to go a step further, and to say, that when the facts of the estate, *aliunde* the will, show that the testator must have known that if a legacy was to be paid only from personal estate, it would be a barren gift, he must have intended to subject the real estate to a liability for it."

Since this was written in 1881, the courts have examined extrinsic facts to ascertain the intention of the testator, as is evidenced by the cases already cited.

In *Briggs v. Carroll* (117 N. Y. 288), Judge FINCH writing for the court, cites with approval *Brill v. Wright (supra)* and *McCorn v. McCorn (supra)*. Referring to the merits of the case in which he was writing, he said: "The testator by his will gave to his wife a legacy of \$2,500, to be accepted by her in lieu of dower; to his son Charles \$1,500.00, 'to be held and used by his mother as necessity might require for his education'; and to his grandson, the plaintiff, \$500.00. \* \* \* Here were legacies of \$4,500.00 with but \$1,500.00 worth of personal property out of which to pay them. One of these was in lieu of the wife's dower, and another for the education of the son Charles. The declared purpose of each gift leads strongly to the inference that the testator did not suppose that they would, or mean that they should, abate, and be largely reduced. \* \* \* Either he intended to sacrifice the comfort and welfare of his wife and son Charles for the benefit of his older and married children, and deliberately continued to make their situation worse by putting personal estate into land and incurring debts, or he supposed that their legacies would rest upon the real estate. I think we are justified in holding that the latter was his understanding of the will."

What language could be more apposite to the case at bar? It is apparent from the provisions of the will before us that Elisha was an unfortunate son who needed a father's care. The testator sought to discharge that duty in drawing his will, and a portion of his scheme was contained in the residuary

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clause which devised and bequeathed to his two daughters all his real and personal estate not disposed of by the previous provisions of the will. He not only directed each of his daughters to pay to Elisha the sum of \$125.00 a year, afterwards cut down to \$75.00 by the second codicil, but provided that each of them should set apart out of the personal property he was bequeathing to them the sum of \$2,500.00, and invest the same, and hold it in trust, to be paid to the next of kin of Elisha upon his death. The testator also imposed, substantially, similar provisions upon the devises made to his sons David and William. It is not to be assumed that this testator inserted such provisions as these in his will unless he was of the opinion that there would be a sufficient amount of personal property passing to his daughters at the time of his death, thereby enabling them to carry out his requirements of setting apart a trust fund of \$2,500.00 each for the next of kin of his unfortunate son Elisha.

It is not to be presumed that this testator contemplated the slightest uncertainty as to the payment of these legacies to the next of kin of Elisha. He had made ample provision for all his other children except Elisha, and it was clearly his desire to provide for one who could not care for himself and his next of kin. It is natural to presume that the testator was most solicitous in regard to the carrying out of the provisions relating to Elisha and his children. If it be the fact that testator owned no personal property, either at the time of making the will or when he died, and we must assume that such was the situation under the findings, we are left only to conjecture that he met with subsequent reverses, or made changes in his investments.

The judgment of the Appellate Division appealed from should be affirmed, with costs.

HAIGHT, J. (dissenting). This action was brought to obtain a construction of the last will and testament of Jacob V. B. Teller, deceased. The testator, after making provisions for his widow and sons, provided that "All the rest and residue

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of my real and personal property I devise and bequeath upon my wife's decease to my daughters Margaret M. Strong and Anna M. Irwin, share and share alike, subject to said payment to their brother William, and subject also to the payment by each of them of the sum of \$125 a year to my son Elisha P. Teller during his life, in half-yearly payments, and in order to secure such payment I direct that each of them shall set apart out of the personal property hereby bequeathed to her the sum of \$2,500, and invest the same and hold it in trust and pay the income thereof to the amount of \$125 a year to said Elisha, and if there be any deficiency in the income she shall make up what it falls short of such amount of \$125 out of her own means, and shall not be entitled to commissions or compensation as trustee, but payment of such deficiency shall be only a personal debt to Elisha and not a charge upon her property." The will further provided that with reference to the trust fund directed to be held by each of his daughters for the benefit of his son Elisha, that upon the latter's death such funds shall "be paid over and transferred to his next of kin." By a codicil he reduced the amount to be paid to Elisha by each daughter annually from \$125 to \$75.

The testator died leaving no personal property other than that which had been specifically bequeathed to his sons and wife, and consequently no personal property came to the hands of the daughters under the residuary clause of the will. The only property that came to them was a lot on Hawk street and two lots on Hudson avenue in the city of Albany, and a vacant lot located on Second street in the city of Rensselaer 25 feet front by 100 feet deep, which is represented to be of little value. One of the Hudson avenue lots was so heavily encumbered that it was subsequently sold upon the foreclosure of a mortgage and the title passed to other persons. The other lot on Hudson avenue was encumbered by a mortgage for \$3,000.

The daughters, receiving no personal property from the testator, were unable to set apart the trust of \$2,500 each, and there

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has never been such a fund in their hands. They, however, out of the estate coming to them, annually paid the sum of \$75 each to their brother Elisha during his lifetime. The respondents, the children of Elisha, now demand the payment to them of the sum of \$2,500 from each of the daughters, making a total of \$5,000, and ask that it be made a charge upon the real estate devised to the daughters. The question is, therefore, presented as to whether the testator so intended.

In determining this question it must be borne in mind that it distinctly appears that at the time of the testator's death his widow held in her name a number of mortgages upon real estate amounting to a number of thousands of dollars and that in making this provision he supposed that he was possessed of sufficient personal property to make up the "trust fund," as he called it.

The testator at the time of making his will was well advanced in years, and he first gave to his wife the use of all his property of every description, both real and personal, during the term of her natural life, giving her full power to sell and convey and to use so much of the principal as she might see fit. He then upon her death disposed of that which should be left to his sons and daughters. His widow survived him about a year. It is not uncommon for an aged husband who has lived with his wife for many years to regard the property taken in the name of the wife as his, and attempt to dispose of it by will. But, however it may be in this case, one fact is apparent, and that is he did not intend to disinherit his daughters. When he came to securing the payment of the annuity to his son, he directed that each of his daughters shall set apart "out of the income of the personal property hereby bequeathed to her the sum of \$2,500." It will be observed that he specifically limits the fund to be set apart to the *personal property bequeathed* to each daughter. Then fearing that there might be some deficiency in the "income" — not in the principal — he requires the daughter to make up such deficiency, if any, and pay the same out of her own means. But while requiring the payment of such deficiency

out of their own means, he makes that only a personal debt to Elisha, and then for the purpose of removing all doubt, provides that it shall not be a charge upon the daughters' property. In other words, it shall not be a lien upon their real estate. Then again, upon the death of Elisha he does not direct that the daughters shall pay to his grandchildren the sum of \$5,000, but he does direct that "such fund," referring to the fund to be set apart by them out of the personal property, shall be paid over and transferred to his next of kin. I, therefore, am of the opinion that the testator never intended that the \$5,000 should be made a lien on the real estate devised to the daughters.

The judgment should be reversed and a new trial ordered, with costs to abide the final award of costs.

GRAY, HISCOCK and CHASE, J.J., concur with EDWARD T. BARTLETT, J.; CULLEN, Ch. J., and WILLARD BARTLETT, J., concur with HAIGHT, J.

Judgment affirmed.

**KNICKERBOCKER TRUST COMPANY, as Trustee, Appellant, v.**

**ONEONTA, COOPERSTOWN AND RICHFIELD SPRINGS RAILWAY COMPANY et al., Defendants.**

**HENRY W. BEAN et al., Appellants; DANIEL M. LOUNSBURY et al., as Executors of JOHN W. LOUNSBURY, Deceased, Respondents.**

**1. PLEADING.** A defendant, without the service of an answer by himself, cannot require a determination of the ultimate rights of himself and a co-defendant as between themselves, on an answer demanding such determination served on him by such co-tenant.

**2. ACTION TO FORECLOSE RAILROAD MORTGAGE—NONSUIT.** In an action by the trustee to foreclose a railroad mortgage, the complaint alleged the issue of the bonds, default in payment of coupons and a request by a majority of the bondholders that the whole principal be declared due and for its foreclosure; the railroad defaulted in the defense of the action. Subsequently executors holding some of the bonds were permitted to intervene and answered alleging ownership of such bonds, put in issue the default as alleged by plaintiff and set up affirmative defenses which were claimed to render the great majority of the bonds

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issued under the mortgage invalid and not entitled to share in the lien created thereby; the alleged request by the plaintiff was also denied; others claiming to be a bondholders' committee were also permitted to intervene and answered, alleging ownership of 1,110 of the bonds, demanded judgment as prayed for by plaintiff, and also that their title to said bonds be affirmatively established; the executors served their answer upon the bondholders' committee, but the committee did not serve its answer upon the executors. Upon the trial the executors defaulted; the judgment (1) dismissed the answers of the executors; (2) declared the committee to be the owner of the bonds mentioned in the answer; (3) directed the referee after sale to take proof as to who were the holders and owners of the various bonds, except those the title to which was determined by the judgment. Subsequently the Special Term denied a motion by the executors to strike out the first two provisions of the judgment and amend the third so as to direct the referee to take proof generally as to the ownership of all the bonds, which order was reversed by the Appellate Division. *Held*, that so far as any issue was raised by the answer of the executors that required affirmative proof on their part to entitle them to relief, the proceedings at the trial amounted to a nonsuit only; that the order of the Appellate Division, so far as it struck out of the judgment the adjudication of the title of the bondholders' committee, and directed the referee to take proof as to ownership of all the outstanding bonds, was correct and should be affirmed.

*Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co.*, 116 App. Div. 78, affirmed.

(Argued February 20, 1907; decided March 5, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 19, 1907, which reversed an order of Special Term denying a motion to strike out certain portions of a judgment of foreclosure and sale, entered in the above-entitled action, and granted such motion.

The facts, so far as material, and the questions certified are stated in the opinion.

*Charles E. Hotchkiss, Lynn J. Arnold and Garrard Glenn* for plaintiff, appellant. A judgment, binding as between the plaintiff and one defendant and as between the plaintiff and another defendant, is equally binding as between the two defendants themselves if it determined material issues between the plaintiff and the two defendants separately.

(*Craig v. Ward*, 3 Keyes, 387; *Leavitt v. Wolcott*, 85 N. Y. 212; *Pratt v. Johnston*, 59 App. Div. 52; *C. & V. Ry. Co. v. Fosdick*, 106 U. S. 47; *F. L. & T. Co. v. N. Y. & N. Ry. Co.*, 150 N. Y. 436; *Elliott v. Pell*, 1 Paige, 263; *Jones v. Grant*, 10 Paige, 348; *Chamley v. Dunsany*, 2 Sch. & Lef. 718; *Morrice v. Sanford*, 11 Cl. & F. 667.) All of the findings of fact and conclusions of law with reference to the ownership of the 1,110 bonds, and all of such determinations of the judgment were consistent with the case made by the complaint and embraced within the issue. (*Bell v. Merrifield*, 109 N. Y. 202; *N. T. Bank v. Wetmore*, 124 N. Y. 253; *Murtha v. Curley*, 90 N. Y. 376; *Valentine v. Richardt*, 126 N. Y. 272; *Cassagne v. Marvin*, 143 N. Y. 292; *H. T. C. Co. v. Doyle*, 133 N. Y. 603; *E. S. Bank v. Clute*, 33 Hun, 82; *Coleman v. Ryan*, 33 Misc. Rep. 715; *Wagstaff v. Marcy*, 25 Misc. Rep. 121; 1 Freeman on Judg. [4th ed.] § 70.) The Lounsbury executors were estopped from claiming any relief under their motion to modify the judgment. (*Jones v. Reilly*, 68 App. Div. 118; 174 N. Y. 97; *King v. U. Ins. Co.*, 6 How. Pr. 485; *Fletcher v. Barber*, 31 N. Y. Supp. 239; *F. L. & T. Co. v. N. Y. & N. R. Co.*, 150 N. Y. 436; *N. Y. I. Co. v. N. W. Ins. Co.*, 21 How. Pr. 234; *Gridley v. Gridley*, 7 Civ. Pro. Rep. 215; *Siriani v. Deutsch*, 12 Misc. Rep. 213; *Brooks v. Hanchett*, 36 Hun, 70.) The issues as to the ownership of the bonds were not irrelevant or immaterial because they were not tendered by the plaintiff. (*Goebel v. Iflla*, 111 N. Y. 170; *Fletcher v. Barber*, 31 N. Y. Supp. 239; *A. C. S. Inst. v. Burdick*, 87 N. Y. 40; *Brown v. Volkening*, 64 N. Y. 76; *Keeler v. Keeler*, 102 N. Y. 30; *Meyer v. Lathrop*, 73 N. Y. 315; *Older v. Russell*, 8 App. Div. 518; *Chester v. Jumel*, 24 N. Y. S. R. 229; *Hill v. McMahon*, 81 App. Div. 324; *M. Bank v. Thomson*, 55 N. Y. 7; *Vandenburgh v. Mayor, etc.*, 7 N. Y. Supp. 675.)

*Joseph G. Deane* for defendants, appellants. The Special Term under the pleadings and proof herein properly rendered

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a judgment that these appellants owned 1,110 bonds. Such finding was material and necessarily embraced within the issues and consistent with the case made by the complaint. (*F. L. & T. Co. v. N. Y. & N. R. R. Co.*, 150 N. Y. 414; *C. & V. R. R. R. v. Fosdick*, 106 U. S. 47.)

*Henry C. Henderson* and *William A. Davidson* for respondents. Even if it can be held that the defendants Lounsbury did demand such an adjudication as between themselves and the reorganization committee, still the first question should be answered in the negative. (*Grace v. Fassott*, 67 App. Div. 443; *Colyer v. Guilfoyle*, 47 App. Div. 302; *Earle v. Earle*, 73 App. Div. 300; *Everett v. Everett*, 75 App. Div. 369.) The court had no power to grant affirmative relief to one co-defendant against another unless such co-defendant's answer was served upon the other defendants at least twenty days before trial. (Code Civ. Pro. § 521; *Ostrander v. Hart*, 130 N. Y. 406; *Hinkle v. L. Ins. Co.*, 108 App. Div. 316; *Balch v. City of Utica*, 42 App. Div. 567; *Edward v. Woodruff*, 90 N. Y. 396; *Weston v. Stoddard*, 60 Hun, 290; *Payn v. Grant*, 11 Wkly. Dig. 197; *Meigs v. Willis*, 5 Civ. Pro. Rep. 106; *McGuckin v. Milbank*, 83 Hun, 473; 152 N. Y. 297; *Mason's Supplies v. Jones*, 58 App. Div. 231.) The court had no power to adjudicate upon the matters set forth in the judgment and which are the subject of the appeal herein. (*Earle v. Earle*, 73 App. Div. 301; *Mathot v. Triebel*, 102 App. Div. 426; *Rogers v. N. Y. & T. L. Co.*, 134 N. Y. 197.)

CULLEN, Ch. J. This action was instituted by the plaintiff as trustee to foreclose a mortgage of the Oneonta, Cooperstown and Richfield Springs Railway Company to secure the payment of bonds aggregating the amount of \$1,500,000. The complaint alleged the issue of 1,364 of such bonds (\$1,000 each), default in the payment of coupons on said bonds which matured May 1, 1903, May and November, 1904, and May, 1905, and a request by a majority of the bondholders that the whole

principal be declared due under the terms of the mortgage and for its foreclosure. The railroad defaulted in the defense of the action. In December, 1905, a bondholder having applied for a stay of the action the Appellate Division denied such stay on the plaintiff's stipulating to admit as parties defendant to the action any bondholder who might intervene and file his answer before the 12th of that month. In pursuance of this order the respondents who, as executors of John W. Lounsbury, deceased, held 17 of the mortgage bonds, intervened and answered. They alleged the ownership of such bonds, put in issue the default as alleged by the plaintiff and set up several affirmative defenses which they claimed rendered the great majority of the bonds issued under the mortgage invalid and not entitled to share in the lien created thereby. They also put in issue the alleged request on the plaintiff by a majority of the bondholders for the foreclosure of the mortgage and for a declaration that the principal was due.

The appellants, Henry W. Bean and others, who claimed to be a bondholders' committee and the owners of 1,110 of the bonds also intervened and answered. They alleged ownership of the 1,110 bonds, demanded judgment as prayed for by the plaintiff, and also that their title to said bonds be affirmatively established. The intervening defendants Lounsbury served their answer on the defendants Bean and others, but Bean and his associates did not serve their answer on the intervening defendants Lounsbury. The plaintiff forced the action to trial which the Lounsburys seem to have resisted. On the trial being directed to proceed they defaulted. Plaintiff submitted its proof on which the court made findings and directed a judgment of foreclosure. This judgment contained three provisions of which the defendants Lounsbury complained and made the subject of the application now before us. The judgment dismissed the answer of the defendants Lounsbury, with costs; it declared Bean and others to be the owners of the 1,110 bonds mentioned in their answer, and directed the referee, after sale, to take proof as to who were the holders and owners of the various bonds except those the title to

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which was determined by the judgment, to wit, the 1,110 bonds of Bean and others. After the sale the defendants Lounsbury moved to strike out the first two of these provisions and amend the third, so as to direct the referee to take proof generally as to the ownership of all the bonds. The application was denied at the Special Term. The order denying it was reversed by the Appellate Division, which has granted an appeal to this court, certifying for our determination the following questions: 1. May a defendant, without the service of an answer by himself, require a determination of the ultimate rights of himself and a co-defendant as between themselves on an answer demanding such determination served on him by such co-defendant? 2. Did the Special Term, under the pleadings and proof herein, properly render a judgment determining as between the defendants the ownership of the bonds?

We think the plaintiff, doubtless, might have prayed for a determination in the action of the rights and interests of all its *cestuis que trust*, the holders of the bonds issued under the mortgage, as a part of the judgment of foreclosure. Such a judgment, proper notice being given to all the claimants of the bonds to appear and assert their rights, might have precluded all the parties and determined the rights of the *cestuis que trust* among themselves. But the plaintiff did not ask for such relief. All that it was necessary for the plaintiff to establish to entitle itself to a judgment of foreclosure was that there were outstanding valid obligations issued under the mortgage and that the railroad company had made default in their payment. In such an action it was immaterial who owned the bonds, provided the railroad company owed the obligations. The issue as to the title and validity of the various bonds was interjected solely by the answer of the defendants Lounsbury under their claim for affirmative relief, which was in the nature of a counterclaim. Their failure to appear upon the trial and establish their right to the relief prayed for operated the same as a nonsuit would have done in an action brought by them. (*Honsinger v. Union Carriage &*

*Gear Co.*, 175 N. Y. 229.) We think it had that effect and nothing more. Had the defendant Bean and others served their answer on the defendants Lounsbury, they might have had an adjudication on their title to the 1,110 bonds, not because the Lounsburys challenged it, but because they themselves had demanded the adjudication. We think, therefore, that the order below, so far as it struck out of the judgment the adjudication of the title of the appellants Bean and others, and also directed the referee to take proof as to the ownership of all the outstanding bonds was correct, and that the questions certified should be answered in the negative. We are at a loss to see any reason why the direction of the judgment which dismissed the claims of the defendants Lounsbury arising on their answer, with costs, in favor of their co-defendants Bean and others was not proper, but as that question has not been certified to us we cannot deal with the subject.

We wish to define exactly the extent of this decision. So far as any issue was raised by the answer of the intervenors Lounsbury that required affirmative proof on their part to entitle them to relief, we hold that the proceedings at the trial amounted only to a nonsuit, but as to the allegations in the complaint which those defendants put in issue by their answer, and which it was necessary for the plaintiff to prove to entitle itself to judgment, a very different question is presented. It was necessary as against the railroad company for the plaintiff to prove the existence of the outstanding bonds and the amount due thereon. Had the defendants Lounsbury not been parties to the action, while the railroad could not have disputed the amount found due by the judgment, it is probable that any bondholder could challenge the validity of other bonds to the extent necessary to obtain full payment of his own. But in this case the defendants Lounsbury had an opportunity to litigate the amount of the outstanding indebtedness entitled to share in the security of the mortgage. They denied the allegation of the complaint in this respect, and though those defendants made default, the interposition of their answer made it necessary for the plaintiff to prove what bonds were

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outstanding. Therefore, while in the proceeding to distribute the purchase money the respondents Lounsbury will be at liberty to show that they are the owners of any of the 1,110 bonds claimed to be owned by Bean and the other parties, it may very well be that they will be concluded by the judgment that these are outstanding obligations and entitled to share in the security of the mortgage. That question is not presented by this appeal, and, therefore, we do not determine it.

The order appealed from should be affirmed, without costs, and the questions certified answered in the negative.

GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ., concur.

Order affirmed.

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THE FIRST NATIONAL BANK OF TOWANDA, Appellant, v. EMMA A. ROBINSON, as Trustee for LUCIUS ROBINSON, et al., Respondents.

MORTGAGE — WHEN VOID FOR WANT OF CONSIDERATION. A bond and mortgage executed by a trustee with no other consideration than the delivery of a certificate of deposit issued by the mortgagee, representing a sum already belonging to the trustee and which the mortgagee knew belonged to her, is properly held void as without consideration.

*First Nat. Bank v. Robinson*, 105 App. Div. 193, affirmed.

(Argued February 25, 1907; decided March 5, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered August 9, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Judson A. Gibson* for appellant. Under the pleadings and the evidence in this case, the plaintiff was entitled to the regular judgment of foreclosure and sale. (*Best v. Thiel*, 79 N. Y. 15; *Recknagel v. Steinway*, 58 App. Div. 352; *Hammond v. Earl*, 58 How. Pr. 426; *Olivella v. N. Y. & H. R. R.*

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*Co.*, 31 Misc. Rep. 203; *Spencer v. C. M. L. Ins. Assn.*, 142 N. Y. 505; *Fuller v. Artman*, 69 Hun, 546; *Hazleton v. Webster*, 20 App. Div. 177; *M. L. Ins. Co. v. Y. C. Nat. Bank*, 35 App. Div. 218; *Torry v. Black*, 58 N. Y. 185; *Wood v. Knight*, 35 App. Div. 21.) Under the pleadings and the evidence in this case, the fact that the defendant was a trustee in no way tends to invalidate this bond and mortgage, or to show want of consideration for its execution and delivery, or the agreement pursuant to which it was given. (*Kirsch v. Lozier*, 143 N. Y. 395; *M. L. Ins. Co. v. Shipman*, 108 N. Y. 19; *Spencer v. Weber*, 163 N. Y. 493.)

*Alexander C. Eustace and J. P. Eustace* for respondents. Trust funds can always be recovered and trust property reclaimed from unlawful incumbrance unless against a *bona fide* purchaser or mortgagee without notice. (*F. Nat. Bank v. N. B. Bank*, 156 N. Y. 457.) The want of consideration for the execution and delivery of the bond and mortgage in suit was properly pleaded as an affirmative defense. (*M. L. Ins. Co. v. G. C. Nat. Bank*, 35 App. Div. 221.)

WILLARD BARTLETT, J. This is a suit to foreclose a mortgage for \$5,000 executed by the defendant, Emma A. Robinson, as trustee for Lucius Robinson and Emma D. Robinson, to the plaintiff corporation, the First National Bank of Towanda. The only parties to the action are the mortgagee and mortgagor. The defense was want of consideration. The trial court rendered judgment in favor of the defendant, dismissing the complaint and canceling the mortgage, and the plaintiff has appealed from an affirmance of the Special Term judgment by a divided court.

The only consideration for the execution of the mortgage in suit by the defendant as trustee was the delivery to her of a certificate of deposit for \$5,000 issued by the plaintiff bank. The \$5,000 represented by this certificate already belonged to the defendant as trustee. Hence, its delivery to her by the bank and the subsequent payment of the money to her could not have constituted any consideration for the execution and

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delivery of the mortgage on her part. All the transactions were carried on with Mr. Nathaniel N. Betts, the cashier of the bank. Mr. Betts had been made acquainted with the provisions of the trust deed under which the defendant held title to the property which she assumed to mortgage. The bank was chargeable with his knowledge of the contents of those deeds; and, therefore, must be held to have known that the defendant in her capacity as trustee had no right or authority whatever to make the mortgage in suit except for a valuable consideration. The trust deeds conveyed the property therein described to the said Emma A. Robinson as trustee to receive the rents and profits of said property and apply them, share and share alike, to the use of Lucius Robinson and Emma De Voe Robinson, children of the said Emma A. Robinson, during their lives in such wise as should in the judgment and discretion of the said trustee be for the best interests of her said children, and she was further empowered to sell, mortgage or lease the said premises or any part thereof and apply the proceeds of such sale, mortgage or lease, share and share alike, as might in her judgment and discretion be wise for the use and benefit of her said children.

The facts which make it apparent that the \$5,000 represented by the certificate of deposit really belonged to the defendant as trustee may be briefly stated. The defendant had previously entered into a negotiation with Mr. Betts whereby he undertook to make a loan to her as trustee amounting to \$25,000, in consideration of which she was to execute a mortgage as trustee to secure repayment of the amount so to be loaned. Upon that mortgage she actually received only \$17,500. Mr. Betts retained \$2,500, apparently with her consent, to extinguish an indebtedness to the plaintiff bank, the origin of which nowhere clearly appears in this record. The balance of \$5,000 he deposited with the plaintiff bank, and it is that amount for which the certificate was given. At the time this \$5,000 was thus withheld from the defendant, a written agreement was executed by Mr. Betts, as cashier, and by Mrs. Robinson, as trustee, which appears in the appeal

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book as defendant's Exhibit No. 9. This instrument recites that the First National Bank of Towanda has received for deposit in its bank \$5,000 from Emma A. Robinson as trustee to be held by the said bank on certificate of deposit until the said Emma A. Robinson as trustee shall execute and deliver to the said bank a bond and mortgage for \$5,000 upon certain property thereon described as being held by Mrs. Robinson as trustee. The mortgage in suit appears to have been executed pursuant to the terms of this agreement. Why it was signed by Mrs. Robinson or what was the purpose of the cashier in withholding the \$5,000 from her and procuring her signature to this paper is not made to appear. There is no proof which throws any light on this question nor have counsel sought to explain the transaction. In the absence of any explanation, however, it is impossible to perceive that this exhibit militates against the right of the defendant to prevail in this action on the ground that she received no consideration for the execution of the mortgage. It is perfectly clear, as already stated, that the \$5,000 withheld out of the \$25,000 loan and deposited in the plaintiff bank belonged to her as trustee. By giving her the certificate of deposit the bank merely acknowledged its obligation to pay over to her a sum of money which it owed to her as a depositor; and subsequently in actually paying over that money the bank simply recognized her undoubted right to receive it. Such payment could not constitute a consideration for the execution of this trust mortgage and the officer of the bank who conducted the transaction knew it.

The learned judge at Special Term upon the proofs before him committed no error in holding that the mortgage was void for want of consideration and in directing its cancellation. The Appellate Division was right in affirming the Special Term judgment and I advise that the judgment of the Appellate Division be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN,  
WERNER and HISCOCK, JJ., concur.

Judgment affirmed.

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In the Matter of ABRAHAM KAFFENBURGH, an Attorney,  
Appellant.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,  
Respondent.

1. ATTORNEYS—REFUSAL TO ANSWER QUESTIONS UPON THE GROUND THAT ANSWERS MIGHT INCRIMINATE, NO GROUND FOR DISBARMENT. An attorney at law, when called as a witness, has the right to refrain from answering any question which might lead to the prosecution of himself for a forfeiture of his office of attorney and counselor at law; his refusal, therefore, to answer questions as to personal transactions upon the ground that his answers might tend to incriminate him, is not a sufficient cause for his disbarment. (Code Civ. Pro. § 837.)

2. ALLEGED AID TO CLIENT OUT ON BAIL, TO ESCAPE. An attorney is not guilty of unprofessional conduct sufficient to cause his disbarment, in chartering a boat to take his client out of the state after he had been admitted to bail pending proceedings instituted for his extradition to another state, in the absence of a charge or evidence that his client intended to forfeit his bail or that he intended to reach another jurisdiction where he could not be re-arrested or compelled to return, or that his attorney was assisting him in carrying out an unlawful purpose.

3. DISBARMENT—PRACTICING UNDER NAME OF DISBARRED ATTORNEY. An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other disbarred, is guilty of unprofessional conduct justifying his disbarment; he is not protected by the Partnership Law (L. 1897, ch. 420, § 20), and by filing, under an arrangement with the disbarred partner to continue his trade name and practice, a certificate with the county clerk to the effect that he is continuing the business under the name of the firm in compliance with section 863b of the Penal Code; those provisions must be read in connection with those of section 72 of the Code of Civil Procedure, and so read, such attorney not only became liable for the penalties therein provided, but he attempted to nullify the order of the court by arranging to do for the disbarred partner in his name that which the court prohibited such partner from doing himself.

*Matter of Kaffenburgh*, 115 App. Div. 346, affirmed.

(Argued February 18, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 14, 1906, removing the appellant herein from his

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office as an attorney and counselor at law of this state and striking his name from the roll of attorneys.

The facts, so far as material, are stated in the opinion.

*John B. Stanchfield* for appellant. The refusal of Mr. Kaffenburgh to answer questions asked him as a witness, on the ground that the answers thereto might tend to incriminate him, did not constitute professional misconduct. (*Matter of Cohen*, 115 App. Div. 227.) The facts alleged as to the conduct of Mr. Kaffenburgh in Texas, where he was not acting as an officer of the courts of this state, did not constitute misconduct in such office; and the facts alleged do not prove professional misconduct wheresoever committed. (*Matter of Eldridge*, 82 N. Y. 161.) Mr. Kaffenburgh, under the circumstances, was lawfully entitled to practice law in the business name of "Howe & Hunninel." The word "business," as used in the statutes relating to partnerships and business names, includes the business of practicing law. Even if this were not so, Mr. Kaffenburgh was guilty at most of a pardonable mistake as to the law of the situation, upon which lawyers might honestly differ, a mistake in no way involving moral turpitude, and not constituting a punishable offense. (*Goddard v. Chaffee*, 2 Allen, 395; *Doe v. Keeling*, 1 M. & S. 100; *Ragsdale v. Nagle*, 106 Cal. 332; *L.-T. H. Co. v. P. S. Mfg. Co.*, 86 Tex. 143; *Abel v. State*, 90 Ala. 631; *White v. R. G. W. Ry. Co.*, 25 Utah, 346; *State v. Boston Club*, 45 La. Ann. 585; *People ex rel. Parker Mills v. Comr. of Taxes*, 23 N. Y. 242; *Preiss v. Le Poidevin*, 9 N. Y. S. R. 695.)

*Howard Taylor* for respondent. The admitted facts are sufficient to warrant the disbarment of the appellant. (*Matter of Eldridge*, 82 N. Y. 161.)

HAIGHT, J. These proceedings were instituted upon the petition of The Association of the Bar of the City of New York, who, through its attorney, Howard Taylor, presented

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a petition to the Appellate Division of the Supreme Court of the first department, charging the defendant with being guilty of malpractice, deceit or crime and gross unprofessional conduct in his office as attorney and counselor at law.

The first charge is, in substance, that he was a clerk in the office of Howe & Hummel, a law firm in the city of New York, and that upon the trial of Hummel for conspiracy the defendant was called as a witness and asked several questions tending to elicit his connection with the matters pertaining to such alleged conspiracy and that he refused to answer each and all of the questions as to his personal transactions, on the ground that his answers might tend to incriminate him, and that in so refusing he was intentionally deceiving the court or else his connection with these matters was criminal.

The second charge is to the effect that the firm of Howe & Hummel were attorneys for one Charles W. Morse who was endeavoring to have a decree in divorce annulled and that one Charles F. Dodge had been indicted for committing perjury in such proceeding ; that he had gone to Texas where he was apprehended, and that proceedings had been instituted by the district attorney to procure his extradition ; that in order to prevent such extradition Hummel had sent David May, his copartner, Cohen and the defendant, who was his nephew and a clerk in his office, to Texas to endeavor to keep Dodge from being extradited ; that proceedings had been there instituted by them in the Texas courts which went eventually to the Supreme Court of the United States ; that Dodge had been admitted to bail in Texas and during the time that he was out on bail it is charged that "Kaffenburgh chartered a boat to take Dodge over to Mexico. This failed because the captain refused to put in at any Mexican port, having only a coast license ; Kaffenburgh and Dodge were caught by Texas Rangers, both under assumed names."

The third charge is that after Hummel had been convicted of a crime in connection with the proceeding and had been disbarred by the Supreme Court, the defendant filed a certificate in the office of the county clerk, to the effect that he was

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transacting law business under the name of Howe & Hummel, and that in the supplement of the Copartnership Directory Howe & Hummel is given as the business name of Abraham H. Kaffenburgh, and that there is upon the new trial calendar in the county a large number of cases in which plaintiff or defendant is represented by Howe & Hummel. It is further charged that although defendant knew that Hummel had been disbarred he entered into an arrangement with him by which Hummel's trade name and practice were to be continued.

It appears that the firm of Howe & Hummel was formerly composed of William F. Howe and Abraham H. Hummel; that they had conducted the practice of law under the firm name of Howe & Hummel for many years; that Howe died several years ago and after his death Hummel continued the practice of the law under the old firm name.

Upon the return of the proceedings before the Appellate Division the defendant filed an answer in which he denied that he had been guilty of malpractice, deceit or crime, or gross unprofessional conduct with which he was charged. He did not, however, specifically deny any of the acts charged against him as constituting the three charges upon which the Bar Association asked for his disbarment, and the case was therupon submitted to the court upon the pleadings.

With reference to the first charge, the Code of Civil Procedure (§ 837) provides that "a competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor or to expose him to a *penalty or forfeiture*; nor does it vary any other rule, respecting the examination of a witness." (U. S. Const. art. 5; State Const. art. 1, § 6; Code of Criminal Procedure, § 10.) In *People ex rel. Taylor v. Forbes* (143 N. Y. 219, 227) it is said that: "These constitutional and statutory provisions have long been regarded as safeguards of civil liberty, quite as sacred and important as the privileges

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of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights. When a proper case arises, they should be applied in a broad and liberal spirit, in order to secure to the citizen the immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed. The security which they afford to all citizens against the zeal of the public prosecutor, or public clamor for the punishment of crime, should not be impaired by any narrow or technical views in their application to such a state of facts as appears from the record before us. The right of a witness to claim the benefit of these provisions has frequently been the subject of adjudication in both the Federal and state courts. The principle established by these decisions is that no one shall be compelled in any judicial or other proceeding against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterwards be charged, or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

It will be observed that the provision of our Code applies to penalties or forfeitures as well as crimes or misdemeanors. The defendant, therefore, upon his being sworn as a witness in the action pending against Hummel, had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself for a forfeiture of his office of attorney and counselor at law. To now hold that by availing himself of such privilege it amounted to a confession of his guilt upon which a forfeiture could be adjudged would, in effect, nullify both the provisions of the Constitution and the statute. We are, therefore, of the opinion that no offense was stated in the first charge upon which he could properly be convicted.

As to the second charge, the facts as alleged are not denied. The only question raised with reference thereto is as to whether crime or unprofessional conduct on the part of the

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defendant is alleged. He, as a clerk in Hummel's office, went to Texas to endeavor to prevent the extradition of Dodge. Dodge had been arrested in that state, and proceedings by habeas corpus had been instituted. Pending the proceedings, or the review thereof, Dodge had been admitted to bail. During the time he was so out on bail Kaffenburgh "chartered a boat to take Dodge over to Mexico. This failed because the captain refused to put in at any Mexican port, having only a coast license." It is not contended that a lawyer may not properly serve his client in preventing him from being extradited from one state to another, except in accordance with law. It will be observed that there is no allegation that Dodge had forfeited his bail, or that he intended to forfeit the same, or that in going to Mexico he intended to remain and not render himself amenable to the process of the court, in case there should be a decision adverse to him. It is now claimed on the part of the prosecution that it was Dodge's intention to forfeit his bail and to reach another jurisdiction, so that he could not be rearrested or compelled to return to the state of New York to be placed upon trial upon the indictment found against him and that the defendant was planning, aiding and assisting him in so escaping. On the other hand, it is claimed he was but taking a trip for pleasure without any intent or purpose to evade the process of the courts. We think, in the absence of an allegation as to the purpose, that the courts cannot properly assume that his intentions were unlawful or that the defendant was assisting him in carrying out an unlawful purpose. In this connection, it is also stated that "Kaffenburgh and Dodge were caught by Texas Rangers, both under assumed names." When? Whether before or after the adverse decision, or for what purpose they were caught is not stated. It is not charged that they were attempting to escape arrest and that in doing so they had assumed fictitious names or that they had done any act that subjected themselves to an arrest. It is said on their behalf that the proceedings instituted had attracted much attention on the part of the

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press and public and that they assumed fictitious names for the purpose of avoiding notoriety. Here again, we think the allegations of fact are too vague and indefinite and that the court cannot properly assume that the purpose of Dodge or the defendant was unlawful.

A more troublesome question is presented by the third charge. As we have seen, Howe, who was the head of the firm of Howe & Hummel, had been dead for several years. In the meantime the business had been carried on under the old firm name by the surviving partner, Hummel. He, however, had been convicted of a crime and had been disbarred, thus terminating his right to practice law under his own or the firm name. Thereupon the defendant, who was a clerk in his office, filed a certificate in which he claims the right to carry on the practice of the law in the name of the old firm, and this, under an arrangement with Hummel to continue his trade name and practice. Under the provisions of the Code of Civil Procedure a writ or other process issued out of a court of record, including a summons and pleadings, must be subscribed or indorsed by *the attorney for the party* at whose instance it was issued. (§§ 24, 417, 421, 520, 566 and 641.)

It thus appears that there are requirements in the practice of the profession which necessitate the use of the true name of an attorney, or at least that of the firm to which he belongs. The Code of Civil Procedure (Sec. 72) further provides that "If an attorney knowingly permits a person not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party, against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action." Undoubtedly the defendant, during his clerkship in the office of Howe & Hummel, while the firm or the surviving member thereof was conducting the practice of the law, under the direction of his employer, in the conduct of the cases in which the firm had been retained, could use the name of the firm as such clerk, but after the death of Howe and

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the disbarment of Hummel his position as law clerk, of necessity, ceased and could no longer be maintained, for the reason that Hummel could not thereafter carry on the practice of the law or maintain a clerk to do it in his name. It is, therefore, apparent that the defendant, in attempting to practice law in the name of Howe & Hummel, and in signing such name to the writ, process and pleadings, not only violated the provisions of this section of the Code and became liable for the penalties therein provided for, but he enabled Hummel to evade the order disbarring him by arranging to perpetuate his trade name and continue his business. He now claims that he is protected by the Partnership Law and the notice which he has filed. Under the provisions of the Partnership Law business may be conducted under a firm name. Section 20 provides that "The use of a partnership or business name may be continued in either of the following cases: 1. Where the business of any firm or partnership in this state \* \* \* which has transacted business in this state for not less than three years, continues to be conducted by some or any of the partners, their assignees or appointees." (L. 1897, ch. 420.) Section 363b of the Penal Code provides that "No person or persons shall hereafter carry on or conduct or transact business in this State under any assumed name or under any designation, name or style, corporate or otherwise, other than the real name or names of the individual or individuals conducting or transacting such business, unless such person or persons shall file in the office of the clerk of the county or counties in which such person or persons conduct, or transact, or intend to conduct or transact such business, a certificate setting forth the name under which such business is, or is to be, conducted or transacted, and the true or real full name or names of the person or persons conducting or transacting the same, with the post office address or addresses of said person or persons."

It is suggested that the practice of the law by an attorney or a law firm is not a business, and, consequently, is not brought within the provisions of these statutes. It is quite

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true that the profession of the law is not regarded as a business in a commercial sense, but the organizing of a firm or copartnership and the selecting of a firm name, the practice of the profession thereunder and the establishing of a reputation and all that pertains thereto gives it the character of business, and it may be that these statutes apply to copartnerships among attorneys in so far as is consistent with their duties to their clients and to the courts under their oaths of office and the provisions of the Code with reference to the practice of the profession in their own name or that of a copartnership to which they belong. But we are inclined to the view that the Partnership Law and the provisions of the Penal Code alluded to must be read in connection with the provisions of section 72 of the Code of Civil Procedure, to which we have already referred ; and, therefore, when the defendant undertook to file a certificate under the provisions of the Penal Code, selecting a name under which he proposed to carry on the practice of the law, he could not thereby evade or nullify the provisions of that section, nor could he nullify the order of the court, by arranging to do for Hummel in his name that which the court has prohibited him from doing himself. The defendant has not shown himself to be a partner, an assignee or an appointee of the firm of Howe & Hummel, within the requirements of the Partnership Law, and he is not now in a position in which he can acquire such a right. Howe being dead, nothing can be acquired from him ; Hummel being disbarred, he cannot practice law or authorize others to do so for him or on his account in his or the firm's name. We, therefore, conclude that as to the last charge the conviction must be sustained and the order affirmed, with costs.

CULLEN, Ch. J., VANN, WERNER and CHASE, JJ., concur ; GRAY, J., concurs in result ; EDWARD T. BARTLETT, J., not sitting.

Order affirmed.

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**ROSE REIS, Appellant, v. CITY OF NEW YORK et al., Respondents.**

**1. NEW YORK (CITY OF)—WHEN CITY MAY CLOSE PUBLIC STREETS—POWERS OF BOARD OF ESTIMATE AND APPORTIONMENT—GREATER NEW YORK CHARTER, SECTION 442.** Under the Greater New York charter (L. 1901, ch. 466, § 442, as amd. by L. 1903, ch. 409) and upon compliance with the steps therein prescribed, the board of estimate and apportionment has the power, with the approval of the mayor, to change the map or plan of the city by closing an existing street; under such provisions it may close a street, never actually opened or used as a public street, although laid out as a proposed street upon an official map of streets and avenues proposed to be opened as public streets and avenues of a certain township, by commissioners appointed pursuant to law, which map, by force of the annexation and consolidation acts, became a part of the map of the greater city of New York, where, after the consolidation and in pursuance of a resolution of the board of estimate and apportionment, proceedings were instituted to open the street, and thereafter the board by a resolution, adopted in conformity with section 990 of the charter, directed that the title to the property required for the street should be vested in the city of New York.

**2. SAME—WHEN PROCEEDING TO CLOSE PUBLIC STREET NEED NOT ORIGINATE IN LOCAL BOARD OF DISTRICT IN WHICH STREET IS SITUATED—CONSTRUCTION OF SECTIONS 428, 432, 433 AND 434 OF GREATER NEW YORK CHARTER.** The closing of such street by the board of estimate and apportionment with the approval of the mayor is not irregular and invalid because the proceeding did not originate with the local board of the district in which the street is located, as required by the provisions of the charter (L. 1901, ch. 466, §§ 428, 432, 433 and 434) relating to proceedings “to open, close \* \* \* and repair the streets, avenues and public places \* \* \* within the district;” the legislature intended, by these provisions, to confer upon the local boards the authority to deal in the first instance with applications for local improvements made to them *by petition*, but meant to commit to the jurisdiction of the board of estimate and apportionment, with the co-operation of the chief executive of the city, the power of its own volition to initiate and carry through such public improvements as they should deem for the best interests of the city at large, irrespective of any action or lack of action by the subordinate local boards.

**3. SAME—WHEN OWNER OF LOTS ABUTTING ON PART OF STREET CLOSED BY CITY OF NEW YORK, UNDER SECTION 442 OF THE CHARTER, HAS NO CAUSE OF ACTION FOR DAMAGES TO HER PUBLIC EASEMENT OF RIGHT OF ACCESS.** Where the city of New York, owning all the lots abutting on a certain street, between two streets running at right angles

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thereto, together with all the right, title and interest which its grantors had in such street, has closed the street, under and in compliance with the provisions of the charter relating thereto (L. 1901, ch. 486, § 442, as amd. by L. 1903, ch. 409), between the intersecting streets, and erected a building thereon for hospital purposes, the owner of lots abutting on the same street, but in the two next adjacent blocks, facing on the street, has suffered and can suffer no actionable damage, so far as any of her public easements are concerned, by the closing of the street, when it is not intended to close any part of the street upon which any of her property abuts, or any part thereof which is opposite a block in which she owns property, and the closing and discontinuance of the street will still leave all of her lots accessible by public ways.

4. SAME — PRIVATE EASEMENT OF RIGHT OF ACCESS TO AND THROUGH A PUBLIC STREET, ORIGINATING FROM DEDICATION OF STREET BY LOT OWNER'S GRANTOR — EXTENT AND LIMITATION OF SUCH EASEMENT. While the fact, that the conveyances to such lot owner and to the city originated in a common grantor and were made with reference to a map of grantor's property upon which the street in question was laid out and thereby dedicated as a public street, entitles such lot owner to a private easement in the street for the purpose of access, which is a property right of which she cannot be deprived, nevertheless such private easement does not thereby extend to and through the whole of the street as shown on the original grantor's map; it can only extend to the next cross street or avenue on each side of the lots owned by her, and she is entitled, in the first place, to have that part of the street upon which her own property abuts kept open, and, in the second place, to have that part or block of the street which borders her premises kept open at both ends where it is crossed by and opens into intersecting streets.

*Reis v. City of New York*, 118 App. Div. 464, affirmed.

(Argued January 28, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1906, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Alfred E. Sander* and *Charles S. Taber* for appellant. The resolution of the board of estimate and apportionment, directing that Hawthorne street between Kingston and Albany

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avenues, be stricken from the official map, did not effect a legal closing of that portion of the street. (*Matter of Rhinelander*, 68 N. Y. 107; *People ex rel. Dilzer v. Calder*, 89 App. Div. 503; *Matter of City of New York*, 168 N. Y. 134.) All of the grantees of Gerard M. Stevens and their successors in title acquired an easement in Hawthorne street as shown on the map made by said referee, and the making of said map and conveying with reference thereto, effected a dedication of said Hawthorne street for street purposes, which neither the grantor, nor any person holding under him can impeach. (*White's Bank v. Nichols*, 64 N. Y. 65; *Matter of Eleventh Avenue*, 81 N. Y. 437; *Matter of Ladue*, 118 N. Y. 213; *Lord v. Atkins*, 138 N. Y. 184; *Haight v. Littlefield*, 147 N. Y. 338; *Story Case*, 90 N. Y. 145; *Bissel v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Taylor v. Hopper*, 62 N. Y. 649; *Kerrigan v. Buckus*, 69 App. Div. 329.) These private easements were not extinguished by the opening of Hawthorne street as a public street. (*Matter of Adams*, 141 N. Y. 297; *W. Cemetery v. P. P., etc., R. R. Co.*, 68 N. Y. 594; *S. A. R. R. Co. v. Kerr*, 72 N. Y. 330; *Matter of Mayor, etc.*, 28 App. Div. 151.) Even if the resolution of the board of estimate and apportionment striking the street in question from the map could be held equivalent to a legal closing, it would merely extinguish the public easements. Private easements in the street are not affected by such proceedings. (*Holloway v. Southmayd*, 139 N. Y. 390; *Holloway v. Delano*, 139 N. Y. 412; *Taylor v. Hopper*, 62 N. Y. 649; *Matter of Eleventh Avenue*, 81 N. Y. 436; *Tibbits v. Cumbersom*, 69 App. Div. 329; *Edwards v. M. L. Co.*, 48 S. E. Rep. 754.)

William B. Ellison, Corporation Counsel (James D. Bell and R. B. Greenwood of counsel), for respondents. All private easements are extinguished when land is acquired by condemnation proceedings for street purposes except where specifically saved by statute. (*McCarthy v. City of Syracuse*, 46 N. Y. 194; *Roberts v. Sadlier*, 104 N. Y. 833;

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*Matter of City of Rochester*, 24 App. Div. 383; *Utter v. Richmond*, 112 N. Y. 613; *Vil. of Olean v. Stegner*, 135 N. Y. 341; *City of Buffalo v. Pratt*, 131 N. Y. 293.) When the board of estimate and apportionment changed the map or plan of the city by striking therefrom that part of Hawthorne street which lies between Kingston avenue and Albany avenue, the fee of the land in the portion of the street thus closed remained in the city. (*B. P. Comrs. v. Armstrong*, 45 N. Y. 234; *Matter of Mayor, etc.*, 157 N. Y. 409.) Any damages suffered by private owners by reason of the closing of the portion of the street under consideration may be ascertained and paid under the provisions of chapter 1006 of the Laws of 1895. (*Matter of Mayor, etc.*, 157 N. Y. 409.)

WILLARD BARTLETT, J. In order to understand this case, reference must be had to that portion of the official map of the borough of Brooklyn on which appear six city blocks, three on each side of Hawthorne street, between Troy avenue on the east and Brooklyn avenue on the west. Two of these blocks lie between Troy avenue and Albany avenue; two of them (the middle ones) lie between Albany avenue and Kingston avenue, and the third pair lie between Kingston avenue and Brooklyn avenue. The city of New York owns all the lots which abut on Hawthorne street in the two middle blocks, that is to say, the blocks between Albany avenue and Kingston avenue. The plaintiff owns a considerable number of lots in the two easterly blocks, that is to say, in those between Albany avenue and Troy avenue, and also a considerable number of lots in the two westerly blocks, that is to say, in those between Kingston avenue and Brooklyn avenue. Most of these lots belonging to the plaintiff (but not all of them) abut on Hawthorne street.

The city of New York having, as is contended, taken the necessary legal proceedings for the closing and discontinuance of Hawthorne street, between Albany avenue and Kingston avenue has, through the agency of its board of health, erected

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a hospital building upon that portion of Hawthorne street thus closed and discontinued, and threatens further to obstruct that portion of Hawthorne street for hospital purposes. The plaintiff instituted the present suit in equity to restrain the continued maintenance and further erection of such obstructions, basing her cause of action upon two grounds : (1) That the portion of Hawthorne street in question has never legally been closed ; and (2) that even if it has legally been closed in other respects the plaintiff possesses private easements therein of which she cannot be deprived without just compensation.

The assertion that the closing of this portion of Hawthorne street was not legally effected rests upon the contention that the provisions of the Greater New York charter in reference to the closing of streets have not been complied with by the city authorities. The assertion that the plaintiff is the owner of private easements of which she cannot be deprived without compensation even by a lawful closing of the street is based upon the fact that both the plaintiff and the city acquired title to the lots which they respectively own upon the six blocks in question from a common grantor, and that the conveyances to each were made with reference to a map upon which all such lots appeared as laid out and bounded upon the several streets which have been named. The doctrine invoked by the plaintiff in support of this branch of her case is the rule that where lots of land are sold and purchased with reference to a map showing them to abut upon a street or road laid out thereon all purchasers who buy with reference to the general plan disclosed by such map acquire an easement in the strips of land thus designated as streets or roads to have them permanently kept open as public ways.

The plaintiff prevailed upon the trial at Special Term, where the court held in her favor upon both points, adjudging that the proceedings taken by the municipal authorities for the closing of the portion of Hawthorne street in question were not legally effective to accomplish that purpose, and also that the plaintiff was entitled to private easements in and to the whole of Hawthorne street, as shown upon the map

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according to which she acquired title, known as the Pecare map, including the right to have Hawthorne street kept open for its full width and throughout its whole length as thereon delineated, as a means of access to her property from either direction. The judgment based upon this decision has been reversed by the Appellate Division, which decided both of the principal questions involved adversely to the plaintiff and granted a new trial, and the plaintiff has now appealed to this court upon the usual stipulation for judgment absolute in the event of an affirmance here.

I will first consider the legal sufficiency of the proceedings relied upon by the city as having effected the closing or discontinuance of this part of Hawthorne street. These proceedings were undertaken in compliance with what was evidently deemed to be the authority conferred upon the board of estimate and apportionment and the mayor of the city of New York by section 442 of the Greater New York charter (Laws of 1901, chap. 466, as amended by Laws of 1903, chap. 409). The amended section cited empowers the board of estimate and apportionment, whenever and as often as it may deem it for the public interest so to do, "to change the map or plan of the city of New York, so as to lay out new streets, parks, bridges, tunnels and approaches to bridges and tunnels and parks, and to widen, straighten, extend, alter and close existing streets." Notice of its proposed action must be published for ten days in the City Record and corporation newspapers and an opportunity must be given for all persons interested in such change to be heard at a specified place and at a time not less than ten days after the first publication. After due publication of the notice and after hearing any protests and objections which there may be against the proposed change, "if the said board shall favor such change, notwithstanding such protests and objections, and the same receives the approval of the mayor, \* \* \* shall be deemed to have been made."

There is nothing in the findings of the trial court to indi-

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cate that Hawthorne street between Kingston and Albany avenues was ever actually opened or used as a public street. It was laid out as a proposed street upon an official map of streets and avenues proposed to be opened as public streets and avenues in the town of Flatbush upon an official map made in 1874 by commissioners appointed pursuant to law, which map by force of the legislation annexing the town of Flatbush to the city of Brooklyn and subsequently consolidating the city of Brooklyn with the city of New York became a part of the map or plan of the greater city. After consolidation, by virtue of a resolution adopted by the board of estimate and apportionment on March 14, 1900, a proceeding was instituted to open Hawthorne street between Nostrand and Albany avenues (which would embrace that portion of the street to which this controversy relates), and about a year afterward commissioners of estimate and assessment were appointed in that proceeding by the Supreme Court for the purpose of acquiring the necessary title in behalf of the city. Section 990 of the Greater New York charter authorized the board of estimate and apportionment under certain circumstances, after the commencement of a street opening proceeding, to direct by a three-fourths vote that the title to any piece of land lying within the lines of the street to be opened should be vested in the city of New York. Acting under the power thus conferred, the board of estimate and apportionment on July 28, 1902, directed that the title to the property required for the opening of Hawthorne street between Nostrand and Albany avenues should be vested in the city on the 15th day of August, 1902. It does not appear whether or not any other steps were ever taken in this proceeding for the opening of Hawthorne street. Prior to the adoption of the above-mentioned resolution declaring the title vested, the board of estimate and apportionment could have discontinued the proceeding under section 1000 of the Greater New York charter; but the right thus to discontinue a street opening proceeding seems by the language of that section to be restricted to a "time before title to the lands or premises to be

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thereby acquired shall have vested in the city of New York." If, then, after the resolution vesting the title was adopted, the municipal authorities desired to devote that portion of the bed of Hawthorne street between Albany and Kingston avenues to hospital purposes, they could only do so by taking the steps prescribed by law to effect a closing or discontinuance of that part of the street; and this they attempted to do by pursuing the course prescribed by section 442 of the Greater New York charter as amended in 1903, to which reference has already been made. At a meeting of the board of estimate and apportionment held on December 11, 1903, resolutions were adopted proposing to change the map or plan of the city so as to close and discontinue Hawthorne street between Kingston avenue and Albany avenue in the borough of Brooklyn, and appointing a hearing at a meeting of the board to be held on December 29, 1903, at which the proposed action would be considered. Notice of the hearing was duly published as required by section 442. The public hearing duly took place and thereupon the board adopted a resolution declaring that it favored the proposed change in the map so as to close and discontinue that portion of Hawthorne street in question, which resolution was on the day of its adoption duly approved by the mayor of the city of New York.

The learned counsel for the appellant contends that the adoption of this resolution and its approval by the mayor did not constitute a legal closing of Hawthorne street between Albany and Kingston avenues, because the proceeding did not originate with the local board of the district in which the proposed closing was to take place. For the purpose of home rule and local improvements the city of New York is divided into twenty-five districts, in each of which there is a local board, which consists of the president of the borough and of those members of the board of aldermen who represent aldermanic districts within the territorial bounds of such local improvement district. Section 428 of the charter provides that a local board shall have power, in all cases where the cost of the improvement is to be met in whole or in part by

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assessments upon the property benefited, to initiate proceedings for certain specified purposes, among which are enumerated "to open, close, extend, widen, grade, pave, regrade, repave and repair the streets, avenues and public places, and to construct sewers within the district." Section 432 makes it the duty of the president of the borough, when a petition for a local improvement within the jurisdiction of a local board has been received by him, to appoint a time for a meeting of such board, at which meeting such petition will be submitted to it; and section 433 provides among other things that the local board, after the submission of the petition and consideration of the same, "may then, as the petition shall ask, pass a resolution to bridge, to tunnel, to open, to close, to extend, to widen, to regulate, to grade, to curb, to gutter, to flag, and to pave streets," etc. Finally, by section 434 the local board is required, if it shall decide that proceedings be initiated for a local improvement, forthwith to transmit a copy of its resolution to that effect to the board of estimate and apportionment, which must promptly consider the same and approve or reject it. If approved, the resolution must be returned to the president of the borough where it originated, who may thereupon proceed in the execution of the work.

Referring to these sections of the charter, it is insisted in behalf of the appellant that they deprive the board of estimate and apportionment of any power to change the city map so as to open or close streets except in cases where the proceeding is inaugurated by a local board. I am unable to discover any such limitation or restriction either in the express language of these sections or deducible therefrom by fair implication. If the view thus contended for be correct, there would be no power in the general municipal government to set on foot any public improvement which demanded or contemplated the opening or closing of a street, no matter how desirable, without first obtaining the sanction of an official board of a local and limited jurisdiction. In that event it is quite conceivable that the selfish interests of a locality might outweigh and prevail against the interests of the community.

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at large. It seems to me that the plain intent of these statutory provisions is to confer upon the local boards the authority to deal in the first instance with applications for local improvements made to them *by petition*; but that the legislature meant to commit to the jurisdiction of the board of estimate and apportionment, with the co-operation of the chief executive of the city, the power of its own volition to initiate and carry through such public improvements as they should deem for the best interests of the city at large, irrespective of any action or lack of action by the subordinate local boards. The power of the legislature to enact laws for closing streets in the city of New York is unquestioned and its authority to employ the agency of such municipal officials as it shall choose to bring about such closing, or to prescribe the mode of procedure to be adopted for that purpose is equally clear. (*Fearing v. Irwin*, 55 N. Y. 486, and cases there cited.) It is not for the courts to say that one agency should be selected for this purpose rather than another; but even if they were at liberty to criticise legislative action in this respect, there could scarcely be any imaginable ground for such criticism growing out of the fact that the power to alter the city map so as to close streets has been vested in the board of estimate and apportionment—a body which has been deemed by the legislature sufficiently representative and responsible and trustworthy to exercise the power of granting or withholding street railroad franchises within the limits of the municipality in place and stead of the board of aldermen. (Laws of 1905, chaps. 629, 630 and 631; *Wilcox v. McClellan*, 185 N. Y. 9.)

It is to be noted that none of the property of the plaintiff abuts upon that part of Hawthorne street which it is proposed to close. The roadbed of this portion of the street is just one block in length, extending from Albany avenue to Kingston avenue, and the city of New York under deeds from the same predecessor in title as the plaintiff owns all the lots lying on both sides of Hawthorne street between these two avenues together with all the right, title and interest which its

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grantors had in Hawthorne street. Hence it is apparent that the plaintiff has no grievance here in the character of an abutting owner upon a street about to be closed. It is not intended to close any portion of Hawthorne street upon which any of her property abuts or any portion thereof which is opposite a block in which she owns property. It is undisputed that the discontinuance and closing of Hawthorne street between Albany and Kingston avenues will still leave all her lots accessible by public ways; and it follows that so far as any public easements are concerned, she can suffer no actionable damage by reason of the closing of Hawthorne street between the two blocks owned by the city on the north and south sides thereof. "The question of the right or power of a municipality to discontinue a street has frequently been presented to the courts of this state and it has been held that the authorities might do so when it is done in the manner prescribed by law and when there is left to the private citizen other and suitable means of access." (*Eyerer v. N. Y. C. & H. R. R. Co.*, 130 N. Y. 108, 113, and cases there cited.) It is true that the presence of the city's hospital building and the occupation of the former street bed for other hospital purposes will make the plaintiff's property somewhat less accessible than it has been heretofore. This fact, however, is not enough of itself to constitute a limitation upon the right of the city with the sanction of the legislature to close the street. (*Kings County Fire Ins. Co. v. Stevens*, 101 N. Y. 411, 418.) While the city may not close the street so as to prevent access to the plaintiff's premises without a trespass it is enough if access to the plaintiff's lot is preserved though such access may not be quite so convenient as it would be if the street were allowed to remain open.

It is suggested that if a resolution of the board of estimate and apportionment approved by the mayor under section 442 of the Greater New York charter was effective to close a part of Hawthorne street, Broadway in the borough of Manhattan might be closed and cease to be a public street by the mere adoption by the board of estimate and apportionment of

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a resolution striking it from the map; and this is evidently deemed by counsel an idea too monstrous to contemplate with equanimity. It may, therefore, be well to point out that the decision which we make in the present case justifies no such inference. We are dealing here with a street which appears never to have been opened in fact, and with a case where it is not shown that the closing is in any respect a pecuniary detriment to the plaintiff or an injury to her property rights either as one of the public or in her capacity as a private citizen. The statutory enactments relating to the closing of streets in the city of New York are complicated and confusing and it is not always easy to ascertain precisely what legislative enactments on the subject remain in effect since consolidation and the adoption of the Greater New York charter. Thus, in 1895, the legislature passed "An act to provide for discontinuing and closing streets, avenues, roads, highways, alleys, lanes and thoroughfares in cities of more than one million two hundred and fifty thousand inhabitants." (Laws of 1895, chap. 1006.) This statute, of course, could apply only to the city of New York and was, in fact accepted by the city. To what extent it now remains in force is a question of considerable doubt. Its chief purpose seems to have been to provide for the discontinuance of such streets as the local authorities might deem necessary in order to secure and preserve regularity and uniformity in the general and permanent plan of streets and avenues in the city; and it is a matter of local history that it was designed especially to regulate the improvement of portions of Westchester county which had then recently been annexed to the city of New York. Nevertheless, this statute contains some provisions of a general nature, not applicable to merely temporary conditions and which may, therefore, still be in force, as, for example, the provisions of section 5 requiring the corporation counsel, upon the request of parties claiming to have been injured by the closing of streets, to institute legal proceedings to ascertain the compensation to which they are entitled. It is suggested in the brief of the corporation counsel in the present

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case that this statute or parts of it are still operative; but it is not necessary here to decide whether this view is correct or not. The circumstances of this controversy as presented in the record before us do not bring the case within the terms of that act. All that it is necessary to decide on this branch of the case and all that we do decide is that the procedure followed by the board of estimate and apportionment and the mayor under section 442 of the charter sufficed to effect a legal closing and discontinuance of the part of Hawthorne street in question as a public street as against any claim or right of the plaintiff.

There remains to be considered the claim of the plaintiff to a private easement by virtue of which she asserts a perpetual right of way over this part of Hawthorne street, arising out of the fact that the conveyances to her and to the city originate in a common grantor and were made with reference to a map upon which Hawthorne street was laid out as a public street. "It is well settled that when the owner of land lays it out into distinct lots with intersecting streets or avenues and sells the lots with reference to such streets his grantees or successors cannot afterwards be deprived of the benefit of having such streets kept open. When in such a case a lot is sold bounded by a street the purchaser and his grantees have an easement in the street for the purpose of access, which is a property right." (*Lord v. Atkins*, 138 N. Y. 184, 191.) Assuming that Hawthorne street was legally closed by the action of the board of estimate and apportionment with the approval of the mayor, and that the public easements therein were thus effectively extinguished, it is insisted that there were private easements in the street which survived the proceedings to close it, and that the plaintiff is entitled to the application of the rule of law as above stated by Judge O'BRIEN. That a grantee under such circumstances acquires an easement of access as between him and his grantor and those deriving title under him may be and, indeed, must be conceded; but it by no means follows, as is contended by counsel, that such easement in the case at bar extended to and

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through the whole of Hawthorne street as shown on the original grantor's map. While contending for the doctrine that it extends to every street, avenue and public way indicated on such a map, the learned counsel for the appellant concedes that the courts of this state have never yet so held. In *Matter of Twenty-ninth Street* (1 Hill, 189), the grantor had sold lots and bounded the purchasers by Twenty-ninth street as it was laid down on the city map of New York. "He could have intended nothing less by his deeds," said BRONSON, J., "than a declaration that Twenty-ninth Street was, and, so far as he was concerned, should remain a public highway. I do not say that this dedication will extend to all his lands in the site of the street, however remote from the lots sold; but it will, I think, extend to all his lands in the same block, or, in other words, to the next cross street or avenue on each side of the lots sold. The parties must have contemplated an outlet both ways."

I think the private easement of the plaintiff in the present case extended no further. She was entitled, in the first place, to have that part of Hawthorne street kept open upon which her own property abutted. In *Holloway v. Southmayd* (139 N. Y. 390, 411) the grantors had bounded the granted premises upon the Bloomingdale road and included in the conveyance the easements and appurtenances thereto belonging; and this court held that "the grantors impliedly warranted to the grantees that so much of the road should perpetually exist as an open way as bordered upon the premises granted and, in legal effect, granted such usual and more or less necessary easements as would be comprehended in the free flow of light and air over and in the free use of the open way as such, *pro tanto*, and which survived the extinguishment of the public easement in the highway by act of law." Here, as has already been pointed out, no attempt has been made to close that part of Hawthorne street which borders upon the plaintiff's premises. In the second place, it would seem that the private easement of the plaintiff, based upon her purchase with reference to the Pecare map, entitled

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her to have that portion of the street which borders her premises kept open at both ends. (*Taylor v. Hopper*, 62 N. Y. 649.) This is not held to mean, however, that a person possessing such an easement is entitled to have a street kept open at each end, no matter how remote the ends are from the grantee's property. The condition is complied with if there is access to a cross street in each direction. This seems to be as far as the doctrine of dedication by sale with reference to a plat or map has been carried by the courts of this state, although a broader rule prevails in some jurisdictions. (Elliott on Roads and Streets [2d ed.], § 120.) In *Regan v. Boston Gas Light Co.* (137 Mass. 37) the purpose and effect of a reference to a plan in a deed is declared to be a question dependent upon the intention of the parties, and the court says: "In the absence of an express grant, a grant by implication of an onerous servitude upon the land of the grantor, not necessary for the enjoyment of the land conveyed, is not to be presumed unless such is clearly the intention of the parties." It was there held that the defendant could close a whole series of streets shown on the plan according to which the sale was made so long as he left open a private way for the plaintiff to the highway in one direction and to the next side street in another. In *Pearson v. Allen* (151 Mass. 79) it is said by HOLMES, J.: "There are limits to the easements raised in this way by implication, even if there are not limits to the power of creating easements when it is attempted by express words. A reference to a plan like this, laying out a large tract, does not give every purchaser of a lot a right of way over every street laid down upon it." The doctrine of dedication and its limitations, as they seem to me to be applicable to the case at bar, are well stated by the Court of Appeals of Maryland in *Hawley v. Mayor, etc., of Baltimore* (33 Md. 270, 280) as follows: "The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. This

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rule is founded upon the doctrine of implied covenants, and the dedication will be held to be co-extensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. \* \* \* The doctrine of implied covenants will not be held to create a right of way over all the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street, not yet opened by the public authorities, is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed and no further." (See, also, *M. & C. C. of Baltimore v. Frick*, 82 Md. 77.)

Inasmuch as Hawthorne street remains wholly open in front of those blocks upon which plaintiff's property is situated and opens into cross streets at both ends of each block, and inasmuch as there is no suggestion that the erection of the hospital building on the closed portion of Hawthorne street between Kingston and Albany avenues will in any wise obstruct the plaintiff's property so far as light and air are concerned, I am of opinion that the plaintiff has not been deprived of any private easement to which she became entitled by reason of her purchase with reference to the Peccare map.

These views require an affirmance of the order of the Appellate Division and judgment absolute should be ordered against appellant on the stipulation, with costs in all courts.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ., concur.

Ordered accordingly.

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**THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF THE TOWN OF BROOKHAVEN et al., Respondents, *v.* WILSON R. SMITH et al., Appellants.**

**1. RIPARIAN RIGHTS—COMMON-LAW RULE AS TO RIGHT OF ACCESS INAPPLICABLE—RIGHT OF ACCESS INCLUDES RIGHT TO CONSTRUCT PIER BEYOND HIGH-WATER MARK WITHOUT CONSENT OF OWNER OF LAND UNDER WATER.** A riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the state legislature may prescribe for the protection of the rights of the public, although under the common law of England such structure is regarded as a purpresture or an unlawful encroachment upon the rights of the sovereign, and subject to removal at his pleasure. The fact that in the absence of statutory enactment the courts of this state are ordinarily bound by the rules of the common law does not compel them to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances, and which are inconsistent with what a just consideration of those circumstances demand. Where no vested rights are actually concerned, the application of common-law rules depends upon the extent to which they are reasonable and in accord with public policy and sentiment; and in a state like this, with its numerous large navigable bodies of water, in bays, rivers and inland lakes, and where so many riparian owners have made their easement or right of access practical and available by the construction of docks, piers or wharves, and have done so without interference by the state when superior public rights have not been obstructed, such a rule would be without justification and will not, therefore, be established by the courts.

**2. SAME—GREAT SOUTH BAY—TOWN OF BROOKHAVEN.** An owner of upland adjoining Great South Bay has the right of access to the waters thereof from the front of his lot, and such right includes the construction of a pier on the land under water beyond high-water mark, for his own use or the use of the public, without the consent of the town of Brookhaven, which acquired the title in fee to such land under royal grant in 1666, 1686 and 1693, although at that time under the common law of England riparian owners had no such right, and such structure, in the absence of a license therefor, was a purpresture and subject to removal at pleasure.

*Town of Brookhaven v. Smith*, 98 App. Div. 212, reversed.

(Argued November 23, 1906; decided March 12, 1907.)

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N. Y. Rep.]Points of counsel.

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 5, 1904, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Willard N. Baylis* and *Frederick R. Coudert* for appellants. The owner of upland bordering upon navigable waters has riparian rights, including the right to make, maintain and use a suitable wharf or pier for a means of access to the navigable part of such waters. (*T. I. S. Co. v. Visger*, 179 N. Y. 206; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79; *Saunders v. N. Y. C. & H. R. R. R. Co.*, 144 N. Y. 76; *People v. Mould*, 37 App. Div. 35; *Sage v. Mayor, etc.*, 154 N. Y. 70; *Matter of City of New York*, 168 N. Y. 136; *People v. P. C. Co.*, 32 Misc. Rep. 478; *City of Brooklyn v. Mackay*, 13 App. Div. 105; *Town of North Hempstead v. Gregory*, 53 App. Div. 350; 100 N. Y. S. R. 28; *Shively v. Bowlby*, 152 U. S. 1.) The common law of England as it existed at the time grants were made to the predecessors in title of the parties to this action does not fix the rights of the parties hereto. Such law has been modified in the several states and colonies, including New York. (*People v. Mould*, 37 App. Div. 35; *Kane v. N. Y. E. R. Co.*, 125 N. Y. 164; *Bell v. Gough*, 23 N. J. L. 629; *P. S. E. Co. v. P. S. S. Co.*, 12 R. I. 348; *People v. P. C. Co.*, 32 Misc. Rep. 479; *Sumner v. City of Gloversville*, 35 Misc. Rep. 526; *People ex rel. N. F. P. Co. v. Smith*, 70 App. Div. 543.) The present rights of the town of Brookhaven as to this land under water are identical with the rights the state would have possessed had no patents been granted. The state succeeded the crown in ownership and the present ownership is limited by the ancient common law of England as modified by the evolution of the law of this state during the past two centuries. (*Town of North Hempstead v. Gregory*, 100 N. Y. S. R. 28.)

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*Timothy M. Griffing and W. Kintzing Post* for respondents. Ancient grants must be construed according to the law as it stood at the time they were made. (*People ex rel. Howell v. Jessup*, 160 N. Y. 249.) Under the common law, at the date of these patents, a riparian owner upon navigable water had no right to build any structure whatever for any purpose, on the adjoining land under water without license of the king, or other owner of such land, and this irrespective of any question as to the obstruction of navigation. (*Johnson v. Barrett*, Aleyn, 10; *Atty.-Gen. v. Philpot*, 2 Anst. 607; *Hale de Portibus Maris*, Hargr. L. Tr. 85; *Atty.-Gen. v. Richards*, 2 Anst. 603; *Parmenter v. Gibbs*, 10 Price, 412; *Shively v. Bowlby*, 152 U. S. 1; *People v. Vanderbilt*, 26 N. Y. 287; *Cobb v. L. P. Comrs.*, 202 Ill. 427.) The property, vested in the town by its patents, cannot be divested or affected, without compensation, by any modification of the law since those rights became vested. (*Cobb v. L. P. Comrs.*, 202 Ill. 427; *Trustees, etc., v. Strong*, 60 N. Y. 56; *Fletcher v. Peck*, 6 Cranch, 87.) Even as to the submerged lands of the state the right claimed has never been established in New York. (*People v. Vanderbilt* 26 N. Y. 287; *Hedge v. W. S. R. R. Co.*, 150 N. Y. 150; *Delancey v. Hawkins*, 23 App. Div. 8; *Delancy v. Welbrock*, 113 Fed. Rep. 105; *T. I. S. Co. v. Visger*, 179 N. Y. 206; *Town of North Hempstead v. Gregory*, 53 App. Div. 350; *Saunders v. N. Y. C. & H. R. R. R. Co.*, 144 N. Y. 75; *City of Brooklyn v. Mackay*, 13 App. Div. 105; *Sage v. Mayor, etc.*, 154 N. Y. 78; *Shively v. Bowlby*, 152 U. S. 1.)

GRAY, J. This action is in trespass, for building a pier upon certain lands under water, in the Great South bay; of which the plaintiff, the town of Brookhaven, is seized in fee, under crown grants made by royal governors in the years 1666, 1686 and 1693. The appellant Smith is the owner of a piece of upland, bounded on high water mark, by title derived under a crown grant made to William Nicoll in 1697. From this upland a pier, built upon piles, extended for about 150

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feet into and over the waters of the bay ; which was owned and used by Smith and the other defendants for their greater convenience and facility in entering and in leaving their pleasure boats. Post, who is joined with the town as a party plaintiff, is its lessee. I understand that the plaintiffs conceded that the dock, or pier, was suitable enough for the purpose and, regarded, merely, as a structure, unobjectionable, and that their contention is that, without their consent, the defendants could not erect and maintain it. The defendants claim that, in erecting the pier, they have but lawfully exercised such rights as appertained to their ownership of the upland and as were necessary, in order to gain access to navigable waters. The question has been considered and decided below in the light of the rule of the common law of England ; as the same was at the time of the grants and as it construed the rights of a riparian owner. It was held that these grants, having been confirmed by the constitution of this state, constituted contracts, the obligations of which the state cannot impair, and that, therefore, they are to be protected to the extent that they would have been, had "the Sovereign of Great Britain continued the owner of the soil." In this view the riparian owner is accorded no right, in the absence of a license therefor, to build anything below high water mark and "has no higher rights than those of the General Public." It is contended upon the authorities, and with reason, that so absolute was the character of the crown proprietorship, if the owner of lands in England, upon the tide water of the sea, or of navigable rivers, constructed a wharf, or a dock, beyond high water mark, his structure, if obstructing the public right of navigation, or the *jus publicum*, could be abated as a nuisance ; or if a mere intrusion upon the *jus privatum* of the sovereign, as a purpresture, it was, equally, subject to removal at the pleasure of the crown. (See Gould on Waters, sec. 167; Hale's de Portibus Maris, 85; *Atty. Gen'l v. Richards*, 2 Anstr. 603; *Shively v. Bowlby*, 152 U. S. 1.) It is insisted that this rigid common-law doctrine, upon the subject of a riparian owner's rights, should control

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our present decision ; notwithstanding that this court has, in several instances, expressed, and quite deliberately, a rule of interpretation, which gives a practical value, or utility, to the riparian owner's conceded right of access to the navigable part of the body of water in front of his upland. I cannot agree that, in construing these grants of lands under the waters of the bay, we are bound to hold with the doctrine of the common law of England, as to the exclusive nature of the grantee's possession and as to his right to restrict the enjoyment of the riparian owner's right of access. The evidence of the common law, so far as it has not been declared in English statutes, we find in decisions of English courts rendered in existing controversies and those decisions will be given their due effect here, when the law has not been changed by our statutes; unless new conditions, or a different public policy, demand that the rule contended for be modified by our courts in its application. Different political and geographical conditions may justify modifications and whether common-law rules will be followed strictly by our courts will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in accord with our public policy and sentiment. In not applying, in all its strictness, the common-law doctrine, as declared by the English courts, this court has only interpreted the rule in a juster and more equitable sense and has affected no vested rights. That the town of Brookhaven, under its grants, acquired the title to the particular lands under water of the bay was settled by the decision in its case against *Strong* (60 N. Y. 56); but it took and held the thing granted in its corporate political capacity, and as the representative of the crown, or of the colonial government, to be administered for the public good. (*De Lancey v. Piepgas*, 138 N. Y. 26.) Upon the organization of the state government, it continued to hold the soil of the bay in that capacity, and, representatively, for the benefit of the members of the community. Whatever its rights acquired by the grant, they were and are, nevertheless, subject to the public

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rights of navigation and to rights of access of riparian owners. These rights have ever existed and, with respect to the latter, their nature and extent, when brought into question in this state, were not necessarily to be measured by English standards. The proprietary rights of the town were, and they must continue to be, subject to what, under the circumstances, is decided to be a reasonable exercise by the riparian owner of his right of access to the navigable waters of the bay. The argument that the measure of the right of the riparian owner to the use of the foreshore, or land below high-water mark, for purposes of access to the bay, must be ascertained by reference to what was the rule at common law, at the time of the grants, in my opinion, is unsound. The adoption by the people of this state of such parts of the common law, as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles, which are inapplicable to our circumstances and which are inconsistent with our notions of what a just consideration of those circumstances demands. The common law of England, upon the subject of the rights of riparian owners, has but an imperfect application to the situation in a state like this, with its numerous large navigable bodies of waters, in bays, rivers and inland lakes. (See *Brown v. Scofield*, 8 Barb. 239; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461.) To borrow the language of Judge BRONSON, in his opinion in *Starr v. Child*, (20 Wend. 149), "no doctrine is better settled than that such portions of the law of England, as are not adapted to our condition, form no part of the law of this state." Such as were inconsistent with the spirit of our institutions, or had special reference to the physical conditions of a country widely differing from our own, never became a part of our law, upon the organization of this state. (*Lovener v. Wells*, 13 How. Pr. 456; *People ex rel. Loomis v. Canal Appraisers, supra*.) We have but to consider the position of Great Britain, as an island, with short rivers, navigable only as far as the tide flows and ebbs, and a reason for the rigidity of the rule early asserted as to the extent

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of the rights attaching to riparian ownership may appear, in the apprehension of the "straitening of the port by building too far into the water." (From Hale's *de Portibus Maris*.) Our position is different, physically and governmentally.

The *jus privatum* of the crown, by which the English king was deemed to own the soil of the sea and of navigable rivers, in his own right, rather than as a sovereign holding it in trust for his people, however applicable to the conditions in Great Britain, were totally inapplicable to the situation of the colonists of this country. In Gould on Waters, the author remarks, as to this, that "there is no evidence that the *jus privatum* \* \* \* was ever asserted in the colony as the right of the Crown, or that it has, until recently, been claimed by the States; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the land from the first settlement of the province and exercised by them to the present day, so as to have become a common right and thus the common law." (3d ed. sec. 32).

I may observe, in passing, that in England the common-law rule, which left the riparian owner without any remedy, when his right of access was destroyed by public works, has been modified, within recent years. (See *Buccleuch v. Metrop. Bd. of Works*, L. R. [5 Eng. & Ir. App.] 418.)

It is a matter of general observation, of which judicial notice may wisely be taken, that riparian owners everywhere upon the numerous navigable bodies of waters within the territorial limits of this state have made their easement, or right of access, practical and available by the construction of docks, piers, or wharfs, and have done so without interference by the state, where superior public rights have not been obstructed. These interests must be very large and if we shall hold with the English common-law doctrine, that they are purprestures, or unlawful encroachments upon the proprietary rights of the state, as would follow, if we affirm this judgment, and that they are revocable at pleasure, it would result in causing a very grave loss. Such a decision would be

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to ignore what has been believed to be a common right, within numerous adjudications of our courts.

In the early case in this court of *Gould v. Hudson River R. R. Co.*, (6 N. Y. 522), it was held, upon the authority of *Lansing v. Smith*, (8 Cow. 146), that a riparian owner on the Hudson river had no private right, or property, in the waters, or in the shore, between high and low-water mark. In that case the plaintiff sought to recover compensation from the defendant; which, pursuant to a grant from the legislature, had constructed its railroad along the shore between high and low-water mark and, thereby, had cut off his communication with the river. The principle of that decision, as bearing upon the authority of the legislature to deprive abutting owners upon streets of their easements, came under consideration in the case of *Kane v. N. Y. Elev. R. R. Co.*, (125 N. Y. at p. 184), and it was observed, with respect to the case, "that it has been frequently criticised and cannot be regarded as a decisive authority upon the point adjudged therein." Judge ANDREWS points out that in *Lansing v. Smith*, upon which the *Gould* case was decided, the particular question was reserved by the chancellor. In *Rumsey v. N. Y. & N.E.R. R. Co.*, (133 N. Y. 79); the plaintiffs sought to recover damages to their uplands, sustained through the act of the defendant in cutting off their access to the river by the construction of its roadbed across the water front. The decision was predicated upon the nature and extent of the plaintiffs' rights as "ordinary riparian owners on the banks of navigable rivers" and held, with reference to the *Gould* case, which had been cited by the defendant as a precedent, as in the *Kane Case*, (*supra*), that it was not to be followed. The language of the opinion was that it had "been frequently criticised and questioned and, it is believed, has never been fully acquiesced in by the courts, or the profession, as a decisive authority, or a correct exposition of the law respecting the rights of riparian owners." The rule, as it had been enunciated by the Supreme Court of the United States in the case of *Yates v. Milwaukee*, (10 Wallace 497), was adopted by this court in *Rumsey's* case as

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correctly expressing the right of a riparian owner; whether his title "extends beyond the dry land or not, he is certainly entitled to all the rights of a riparian proprietor, whose land is bounded by a navigable stream, and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing wharf, or pier, for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public." Later, this doctrine, so explicitly asserted in the *Rumsey Case*, (*supra*), was emphatically reasserted in the case of *Saunders v. N. Y. C. & H. R. R. R. Co.*, (144 N. Y. 75, 87). There the question concerned the rights of the owners of lands upon the Hudson river as against the defendant, whose railroad, constructed over the foreshore, cut off convenient access to the river, and it was held that "what these rights are has been decided in the *Rumsey Case*, (133 N. Y. 79). \* \* \* They embrace the right of access to the channel, or navigable part of the river, for navigation, fishing and such other uses as commonly belong to riparian ownership, the right to make a landing wharf or pier for his own use, or for that of the public, with the right of passage to and from the same with reasonable safety and convenience." Quite recently, again, in the case of *Thousand Islands Steamboat Co. v. Visger*, (179 N. Y. 206), the rule stated in the *Rumsey Case*, (*supra*), and restated in the *Saunders Case*, (*supra*), was reasserted with respect to the rights of riparian owners, in the following language: "As riparian owners, Cornwall and Crossmon, originally, in building a dock out into the river, but exercised the right, at all times, conceded to such ownership. The proprietors of lands upon navigable waters are entitled to the right of access to the navigable part of the river and to the right to make a landing wharf, or pier, for their own use, or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose," (citing 3 Kent's Com. 451 and the *Yates* and *Rumsey* cases).

It is urged, however, with respect to these cases that the

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particular question in this case was not presented in either, namely: the right to construct a pier into the river, and, therefore, that what was said in the opinions should not be conclusive upon us in our present discussion. While it may be true that what was said, as to the measure, or substance, of the riparian owner's right of access from his upland to the navigable body of water in front of it, was not essential to the decision of the precise issue, it was, nevertheless, the deliberate and careful expression of an opinion as to that right and one not altogether impertinent to the decision of the particular case. As establishing the rule of law in this state upon the extent of a riparian owner's right, the decision in the *Rumsey* case has been followed, and acted upon, by the Appellate Division of the Supreme Court, in at least three of the judicial departments. (*City of Brooklyn v. Mackay*, 13 App. Div. 105; *Jenks v. Miller*, 14 ib. 474; *People ex rel. Cornwall v. Woodruff*, 30 ib. 43; *People v. Mould*, 37 ib. 35; *Town of North Hempstead v. Gregory*, 53 ib. 350; *City of Buffalo v. D., L. & W.R. R. Co.*, 68 ib. 488.) It was recognized by the Supreme Court of the United States as authoritative in this state, as late as in *Scranton v. Wheeler*, (179 U. S. 141). In each of the cases in the Appellate Division, the question of the substance of the right pertaining to riparian ownership was discussed with more or less elaborateness and the opinion in the *Rumsey* case was regarded as stating the law of the state upon the subject to be that the right of access comprehends the erection of a pier, or wharf. In *City of Brooklyn v. Mackay*, (*supra*), a case which concerned the right to construct a pier, it was said by the present chief judge of this court that "the foundation of the argument by the appellants is the assumption that a pier cannot be constructed without a grant from the state of the land under water upon which it rests. This probably was the law in this State under *Gould v. H. R. R. R. Co.* (*supra*); but, since the decision in the case of *Rumsey v. N. Y. & N. E. R. R. Co.*, (*supra*), it no longer obtains." In *Jenks v. Miller*, (*supra*), Judge CULLEN, again, referring to the fact that under the

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English law the right of access of a riparian owner did not include the right to erect a pier, or other structure in the water, without the consent of the crown, said: "In this country it has generally been held that the upland owner has the additional right of constructing a proper pier, or landing for the use of himself and the public, subject to the general regulations prescribed by the State or the United States, (*Yates v. Milwaukee*, 10 Wall. 497), and, since the decision in *Rumsey v. N. Y. & N. E. R. R. Co.*, (*supra*), that is the rule in this State." In *People v. Mould*, (*supra*), it was sought to remove a wharf in the Hudson river, which the defendant had constructed, upon the ground that though neither a nuisance, nor an obstruction to navigation, it was a purpresture. The opinion of Judge PUTNAM reviews this question most elaborately and reaches the conclusion that the defendant had but exercised his right of access to the navigable portion of the river and "had only done what was necessary to be done to obtain the benefit of his easement—what the authorities determine he had a legal right to do—without creating a nuisance," when he built his wharf in the shoal water near the shore, without obtaining a grant from the state.

The case of *People v. Vanderbilt*, (26 N. Y. 297 and 28 ib. 396), to which reference is made, is not in point; for there the structure erected by the defendant was a crib, with the superstructure of a pier, erected beyond the pier line of the city of New York, as established by law, and it was held to be a public nuisance. The case of *Hedges v. West Shore R. R. Co.*, (150 N. Y. 150), was altogether different in its facts. The plaintiff in that case had claimed the right to interfere with the bed of the Hudson river, by digging a canal outside of the limits of his grant and thus changed the natural situation. That portion of the opinion, which is relied upon as limiting the riparian owner's easement, or right of access, must be read in connection with what the plaintiff was undertaking in the maintenance of an artificially deep channel in the bed of the stream from his business plant out into the river. The *Rumsey* and *Saunders Cases*, (*supra*), are

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cited in the opinion, (which was delivered by the same judge, who spoke for the court in those cases), as establishing the nature of the rights of a riparian owner. (p. 156.) The cases of *Sage v. Mayor, etc., of N. Y.*, (154 N. Y. 61), and of *Matter of City of New York*, (168 ib. 134), did not contain the question now before us; but I find no difficulty in harmonizing what was said in each of the two cases, with respect to the rights of owners of land bounded upon a navigable river, with the rule as stated in the *Rumsey* and later cases, to which I have referred. It was said by Judge VANN in the *Sage* case and, in substance, repeated by Judge WERNER in the other case, that such owners were entitled "to certain valuable privileges or easements, including the right of access to the navigable part of the river in front, for the purpose of loading and unloading boats, drawing nets and the like," and the *Rumsey* and *Saunders* cases were cited. It would seem quite just and quite logical to read the language as intending that whatever might be held to be necessary to the practical enjoyment of the right of access for such purposes would, of course, be comprehended.

In *Shively v. Bowlby*, (152 U. S. 1), to which our attention is, especially, drawn, the question concerned the title to lands below high-water mark upon the Columbia river in the state of Oregon; which had been acquired by the plaintiffs in error, while Oregon was yet a territory, from the United States and upon which the defendants in error had built a wharf, under deeds to them from the state of the tide lands. The opinion reviews, at great length, the authorities and reaches the conclusion that the title, which, by the common law of England, was in the king to the soil of the sea, or of its arms, below high-water mark, had vested in the several states of the Union, subject to the rights surrendered by the Constitution to the United States. As by the common law, no one could erect a building, or wharf, upon the land below high-water mark, without a license, it followed, as the common-law rule of England upon the subject had become the law of the colonies and states of this country, except so far as

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modified by laws, or usages, and had been declared by the Supreme Court of Oregon to govern the rights in that state of upland proprietors, that the state, under the decision of its court, had the right to sell the lands under water free of any right in the proprietor of the upland. It was held that the law of Oregon, "as enacted by its legislature and declared by its highest court," governed the case. It was pointed out in the opinion that the law of Oregon had followed the law as it had been declared in New York in *Gould v. Hudson R. R. R. Co.*, (*supra*), and it was, also, observed that the case had been overruled and a different doctrine declared in later cases in this court; citing *Kane v. N. Y. Elev. R. R. Co.* and *Rumsey v. N. Y. & N. E. R. R. Co.* (*supra*). The *Shively* case declares the common-law rule upon this subject, as established in Great Britain by the decisions of the courts of that country, and with great clearness; but it is not, of course, obligatory upon this court to adopt such a rule in the decision of this case. The Federal Supreme Court, in its decision, explicitly, held itself bound by the law of Oregon, as it had been declared by statute and by decisions in the state court. It was, moreover, recognized that the question was one which was for each state to settle; or, as it was said, "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy."

The interpretation, which, as I have shown, has been given by the courts of this state to the riparian owner's easement, or right of access, is justified in reason, is opposed to no statute and accords better with the circumstances, under which in this country such rights are possessed. This broader view finds some justification in the peculiar nature of our political institutions. In our democratic form of government, the residuary sovereignty not granted to the departments and offices of the government is in the people of the state. The residuary ownership of all property held by the state is in the people of the state and may not the accustomed exercise by property owners of some incidental rights with respect to it, as in the use of the soil of navigable arms of the sea, or rivers,

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for the support of piers and docks, become a common right and, as it has been suggested before, the common law of the state? I think so.

The right of access is conceded to be a valuable one and, unless the foreshore has been appropriated by the general government to some superior, and lawful, public use, as for example, by grant to a municipality, or for navigation purposes, it is entitled to the protection of the law. It has recognition in the statutory provisions which confer upon the owner of the upland the primary right to a grant of the land under water. It is not objected that these defendants have erected a nuisance, in itself, or in some obstruction to public navigation. If it were that, the exercise of the right would be unreasonable; for such ownership is qualified and is subordinate to the public right of navigation, and must be subject to such rules as the legislature may impose for the protection of the public rights in the navigable waters. The courts of this state have been careful, in all cases, while sustaining the rights of the riparian owner, to declare them subordinate to the exercise of the power of the legislature, or of the Congress, for the improvement of navigation, or for the regulation of commerce. They must yield to the demands of public commercial necessities. This structure is conceded to be proper enough for the purpose intended by the defendants and it is no appropriation of the land under water; other than as the soil is used to hold the piles. The defendants have, simply, made their right of access practical. It is a general rule that when the use of a thing is granted, everything is granted by which the grantee may enjoy such use. By analogy, we may reason that the riparian owner's right of access to the navigable waters in front of his upland comprehends, necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right.

So I conclude that the question is not what was the common-law doctrine concerning a riparian owner's right in the foreshore, or tideway; but what that right has been construed to mean by the courts of this state. The town of Brookhaven

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acquired its title under the royal grants; but it holds it in trust for the members of the community and, if we admit that the plaintiff, Post, as its lessee, took exclusive rights under its lease, they cannot avail to abrogate, or to destroy, a right, which appertained to a riparian ownership, to make available the easement, or right of access, by the construction of a landing pier, or wharf.

For these reasons, I advise that the judgment below be reversed and, as the controversy does not depend upon the facts, that the complaint be dismissed; with costs to the appellants in all the courts.

HISCOCK, J. (dissenting). I am unable to concur in the conclusions reached by a majority of my associates.

The facts involved are simple and not in dispute. The plaintiff, the town of Brookhaven, obtained title in fee to the shore in question below high-water mark, under three grants made in behalf of the king, and dated respectively 1666, 1686 and 1693. The respondent Post is its lessee.

Four years after the last grant above mentioned, one of a similar nature was made to William Nicholl under which the appellant Smith has derived title to a small piece of land abutting on the shore at high-tide mark, and the other defendants respectively to other small parcels.

These royal grants are amongst those which were subsequently confirmed by our Constitution (Art. 1, sec. 17), and are entitled to full recognition and credit. They are the foundations upon which must rest the rights of the respective parties.

From the abutting upland above mentioned, appellants have built a dock out over the lands granted to the town into the water for a distance of about 150 feet. We are justified in construing the stipulation of the parties to be that this dock is not objectionable in its form or size if there was a right to build one at all, and this action, therefore, cannot be maintained on the theory that it is such an obstruction to the rights of the public as to be a nuisance *per se*.

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There are no special clauses or circumstances found in or connected with the original grants or the subsequent conveyances thereunder which enlarge or restrict the rights of the litigants under such grants as determined by the general rules of law applicable thereto. It is not urged by the appellants that there was in the grant to the respondents any express reservation of the wharfing privilege which they are claiming. Upon the other hand, the respondents do not claim that the grant to them of the tideway by the crown while it still owned the upland impliedly cut off any easements ordinarily appurtenant to such upland, but upon this appeal they expressly concede to the owners of the latter the right of access to the water without a pier. Neither is there any evidence or claim that in New York as in other colonies and states any ordinances or statutes were or have been passed or any recognized custom or usage developed changing the general principles of law upon the subject and giving to the upland owner greater rights than naturally prevailed. Whatever evidence there is of usage tends to support the respondents' position, because it shows that for many years upland owners have been accustomed to take leases from the town of rights over and beyond the tideway.

Those general principles by which the rights of the parties thus are to be measured, of course, are to be found embodied in the common law as it existed in England at and prior to the dates of the grants and as it had been by the colonists brought to and adopted in this country. (Const. art. 1, sect. 16.) For it is well settled that such grants were in the nature of contracts which are to be construed and interpreted in the light of the law as it prevailed when they were made. (*Fletcher v. Peck*, 6 Cranch, 87, 137; *Danoids v. State of N. Y.*, 89 N. Y. 36, 45; *People ex rel. Howell v. Jessup*, 160 N. Y. 249, 261; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Pritchard v. Norton*, 106 U. S. 124, 132-3; *Barnitz v. Beverly*, 163 U. S. 118, 125.)

Therefore, this interesting controversy seems to narrow to the question what, under the common law, were the riparian rights of an upland owner abutting upon tide water as against the pro-

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prietor of the soil below high-water mark at the time the grants were made through which the parties here derive title, or, to make the issue still more restricted, did that law accord to such upland owner the right to build a wharf over the soil of the other?

This problem must necessarily be determined by reference to those authorities which have interpreted and defined such law, and which are either controlling upon us or proper guides for us in our examination. Their declarations must be accepted as establishing the fact that this ancient law did or did not permit the privilege here claimed by appellants, and their review at considerable length becomes essential even though it may seem tedious.

Before proceeding to a consideration of the authorities, it may be well to call to mind some of the general features and principles which characterize the ownership of the soil under navigable waters, and which may be of assistance in fully appreciating what is said in some of the decisions.

By the common law, both the title and the dominion of the sea and all rivers and arms of the sea where the tide ebbed and flowed and of all the lands below high-water mark within the jurisdiction of the crown of England were in the king, but he held this title and dominion in a two-fold capacity. He had dominion thereof as the representative of the nation and for the public benefit to be derived from the use and enjoyment of navigable waters. This was the *jus publicum* which he could not personally or by grant impair or cut off. The *jus privatum* which the king enjoyed through title to such lands as of waste and unoccupied lands belonged to him as sovereign and proprietor. It was a property right and the title and right which he enjoyed in this capacity he could by virtue of his proprietary interest convey to a private individual, but always subject to the rights and privileges of the people at large comprehended within the definition *jus publicum*. (*Shively v. Bowlby*, 152 U. S. 11; *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71; *Martin v. Waddell*, 16 Peters, 367, 411-13; *People v. Vanderbilt*, 26 N. Y. 287, 292-3.)

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Upon the settlement of the colonies the rights held by the crown passed to the grantees in the royal charters in trust for the communities to be established, and after the American revolution, charged with a like trust, they were vested in the original states within their respective borders subject to the rights surrendered by the Constitution of the United States. (*Shively v. Bowly*, 152 U. S. 57.) These two classes of rights, public and proprietary, afforded opportunity for two classes of wrongs. An unauthorized obstruction, injuring the *jus publicum* by impeding or in any manner interfering with the common right of the public to navigate and use the waters was and is a nuisance and to be abated as such. A purpresture relates, on the contrary, to the *jus privatum*. It was and is an invasion of the right of property in the soil while held by the king or the people. It might or might not also be a nuisance. (*People v. Vanderbilt*, 26 N. Y. 287, 293.) Where, therefore, we find a decision upholding the removal of a dock or similar structure over soil below high-tide water not as a nuisance but as a purpresture, such decision becomes of importance as defining the rights of a proprietary owner as distinguished from the public right of navigation. It could be abated and removed at the suit of the attorney-general in England and by the people in this state, whether a nuisance or not. Being an encroachment upon the soil of the sovereign, like trespass upon the soil of a private individual, it would support an action irrespective of any damage which might accrue. (*People v. Vanderbilt, supra.*)

Proceeding to the authorities, I shall refer first to some of the English ones which have been called to our attention and which seem to establish that in England the common law forbade the owner of the upland to construct a pier or wharf over the soil below high-water mark.

*Johnson v. Barrett*, decided in 1647, is reported in Aleyn's 3 King's Bench Reports, at page 10, as follows: "In an action of trespass for carrying away soil and timber, &c. Upon trial at the bar, the question arose upon a key that was

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erected in Yarmouth, and destroyed by the bailiff and burgesses of the town, and Roll said that if it were erected between high-water mark and low-water mark, then it belonged to him who had the land adjoining, but Hale earnestly affirmed the contrary, viz.: that it belonged to the King of common right; but it was clearly agreed that if it were erected beneath the low-water mark, then it belonged to the King." Here there was no question raised of any impediment to navigation.

Lord Hale died in 1676. His treatise, *De Portibus Maris*, is a leading authority and is found in Hargreave's Law Tracts, and at page 85, in a list of nuisances, contains the following: "The straightening of the port by building too far into the water, where ships or vessels might have formerly ridden; for it is to be observed that nuisance or not nuisance in such case is a question of fact. It is not, therefore, every building below the high-water mark, nor every building below the low-water mark, is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports of England. \* \* \* Indeed, where the soil is the King's the building below the high-water mark is a purpresture, an encroachment, and intrusion upon the King's soil, which he may either demolish or seize or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless, indeed, it be a damage to the port and navigation."

In *Attorney-General v. Richards* (2 Anstr. [1795] 603), which was an action to abate a wharf, the court held that it was immaterial whether or not the wharf was an actual nuisance, it was a purpresture and could, therefore, be abated. (See, also, *Attorney-General v. Philpot*, nowhere reported, but cited in last above case.)

*Parmenter v. Gibbs* (10 Price, 412) was decided in the House of Lords in 1822. The riparian owner had built a wharf between high and low-water mark and the crown brought a bill to abate and remove it. Two points were raised by the defense: *First*, that the defendant had title to the land under a royal grant. *Second*, that the erections were

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no impediment to navigation. The first point having been decided against the defendant, the court declined to consider the second one, holding that upon that ground the judgment ought to be affirmed.

Gould on Waters (Sec. 167) states the common law of England as not securing to the owner of abutting lands the right to extend wharves beyond high-water mark of tide waters.

When we pass to the consideration of decisions in the different courts of the United States, it is, of course, to be borne in mind that the rule of common law as laid down in England has been affected in various states by legislation or usage, and that, therefore, a decision relating to this right in one state would not necessarily be an authority upon the same question arising in a different one. When, however, we find a decision based upon the common law as it existed prior to April 19, 1775, as of which date we incorporated the principles of that law into the law of this state, or an opinion pertinently discussing and defining the common law as it then existed, such decision or discussion becomes a proper authority by which to shape our course in the present case. I think that the clear weight of such authorities is against the right of the upland owner to wharf out over the tideway and adjoining soil. It is not practicable to review all of the judicial literature bearing upon this subject, and I shall refer only to a few of the utterances of courts outside of this state which unquestionably are entitled to much respect.

In *Weber v. Harbor Commissioners* (18 Wall. 57) the plaintiff filed a bill against the defendants to compel them to abate and remove certain erections made by them on the water front of San Francisco, which he alleged interfered with a wharf rightfully put there by him. His rights depended upon certain acts of the legislature of the state giving to the city of San Francisco rights in portions of the lands covered by the tide waters of the bay of San Francisco in front of the city, and a subsequent grant by the city to Weber's predecessors of its title to certain lots. The discussion involved a consideration of what plaintiff's rights would have been in

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the absence of legislation or usage, and Mr. Justice FIELD, after referring to the case of *Yates v. Milwaukee* (10 Wall. 497) as applying the correct doctrine to the facts there involved, said: "Nor is it necessary to controvert the proposition that in several of the states by general legislation or immemorial usage the proprietor whose land is bounded by the shore of the sea or of an arm of the sea possesses a similar right to erect a wharf or pier in front of his land extending into the waters to the point where they are navigable. In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea and of the arms of the sea and in the soils under tide waters is, in England, in the King, and in this country in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

The case of *Shively v. Bowly* (152 U. S. [1893] 1) contains a most elaborate and painstaking discussion of the law upon this question, reviewing with much detail the decisions of the different states. That case came up from Oregon and the direct question involved was whether a donation land claim bounded by the Columbia river, acquired under an act of Congress while Oregon was a territory, passed any title or right in lands below high-water mark as against a subsequent grant from the state of Oregon pursuant to its statutes. The case involved a consideration of the common law upon the question here under discussion as it existed in England and was adopted in this country, and the opinion affirmed each of the following propositions:

1. In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or corporation has acquired rights in it by express grant or by prescription or usage. It is equally

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well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant or long usage under it clearly indicates that such was the intention. By the law of England every building and wharf erected without license below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation.

2. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States.

3. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters and in the land below the high-water mark within their respective jurisdictions.

4. The jurisprudence of Oregon is based on the common law.

And, finally, as a general deduction that in a state like Oregon where there was no special legislation or usage, the common-law rule enunciated would govern the rights of the upland proprietor and he would not be entitled to wharf out.

In *Cobb v. Commissioners of Lincoln Park* (202 Ill. 427) there were under discussion the rights of an upland owner bordering on Lake Michigan, the question being whether such upland owner possessed an easement permitting him to build wharves over the submerged lands in front of him in order to reach the navigable water. The court, in a carefully prepared opinion, assumed the rights of a riparian owner upon the lake to be the same as those of such an owner fronting upon the sea. It decided that the principles of common law which were adopted in that state as they existed prior to March 24, 1606, were still applicable, there being no statute or usage which had modified such law, and then further that "A riparian owner had no right to build any structure on the sub-

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merged lands in front of his own lands unless he owned such submerged lands or had a license to do so. The title of the owner of such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water. Such being the common law it is the law of this state until it is altered by the legislature."

In Connecticut the well-recognized right of the upland owner to erect wharves is predicated upon general, immemorial usage rather than upon the common law. (*East Haven v. Hemingway*, 7 Conn. 186, 203.)

In reviewing the decisions of our own state, I shall refer first to those which are in harmony with the English and American cases already cited, and then I shall attempt to analyze both the New York cases and some elsewhere wherein something has been said which the appellants regard as sustaining their position.

*People v. Vanderbilt* (26 N. Y. 287) was brought to restrain the defendant from proceeding to the erection of a pier extending into the North river and to compel the removal of the part already built as a public nuisance. Upon the trial, the defendant's counsel offered to prove that the proposed pier and crib were not and would not be when completed a nuisance or interference in any manner with the navigation of the river. The trial court rejected this evidence, holding that if the pier were unauthorized by law, it would be *per se* a nuisance. Upon appeal the court discussed the rejection of this evidence, saying: "The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for the purposes of navigation, are entirely separate and distinct. The first of these rights is by the common law vested *prima facie* in the sovereign power. \* \* \* The second is a right common to the whole people, and it is vested in the public at large. A purpresture is an invasion of the right of property in the soil, while the same remains in the king or the people. A nuisance is an injury to the *jus publicum*, or common right of the public to navigate the waters. \* \* \* If the injury com-

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plained of be a purpresture, it may be abated and removed at the suit of the Attorney-General in England, and of course of the people in this state, whether it is a nuisance or not. \* \* \* Being an encroachment upon the soil of a sovereign, like trespass upon the soil of a private individual, it will support an action irrespective of any damage which may accrue. But where the action is to remove a nuisance, which is not a purpresture, a nuisance in fact must in all cases be shown to exist." And it was held that the structure was a purpresture and liable to removal irrespective of whether it was or was not a nuisance.

*Sage v. Mayor, etc., of New York* (154 N. Y. 61) involved the question of riparian rights possessed by an owner of land bounded on the Harlem river, which is a navigable stream where the tide ebbs and flows. Judge VANN, manifestly after great research, discusses most thoroughly the origin and extent of these rights, and it is significant that after doing this in defining them he simply enumerates the right of access to the navigable part of the river in front of the riparian lands for the purpose of loading boats, drawing nets and the like, and does not anywhere include as one of the privileges or easements held by the riparian owner, the right to wharf out into the stream.

*Hedges v. West Shore R. R. Co.* (150 N. Y. 150) involved a controversy between a riparian owner upon the Hudson river and the defendant, which had built its road upon a structure of open piling below high-water mark in front of his premises under a privilege acquired from the state, leaving, however, to the riparian owner suitable and reasonable means of access to the channel. The extent of the rights of such a riparian owner were necessarily involved and fully discussed, and it is again significant that there is not included amongst them, but rather seems to be excluded from them, the right to wharf out into the stream, which right would almost necessarily have been interfered with by the railroad structure in question. The substance of the opinion upon this subject is fairly expressed by that portion of the head note

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which states as follows: "The owner of uplands bounded by the waters of a tidal river has a natural easement or right of access to the channel, but this does not include any right arising from the use of land under water or the bed of the river, below high-water mark."

It is also to be noted that the opinion in this case was written by the same judge whose expressions in the *Rumsey* and *Saunders* cases, hereafter to be referred to, are cited by the appellants as authority for their contention in favor of such right to erect a wharf.

*Matter of City of New York* (168 N. Y. 134) is the so-called "Speedway" case, where the city, by constructing a roadway along the Harlem river, had destroyed the riparian rights of the owners of uplands abutting on that river. The case naturally called for a consideration of what those rights were, and Judge WERNER, in a most careful and elaborate opinion, defines them (page 143) as follows: "The owner of uplands abutting upon a navigable river where the tide flows and ebbs, takes title only to high-water mark. While he does not own the tideway, or the lands under water beyond the same, he has the easement of passage and the transportation of merchandise, to and fro, between the navigable water and his land; to fish and draw nets; to land boats and to load and unload the same." There is no suggestion of the right to construct a pier or wharf.

The cases which are especially relied upon by the appellants as sustaining their position directly or indirectly rest upon the case of *Yates v. Milwaukee* (10 Wall. 497). Either that decision or some decision expressly based upon it furnishes the only important authority for the doctrine which they invoke, and I shall, therefore, consider it first. It was said in that case: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for

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the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton v. Strong* (1 Black, 25), and the *Railroad Co. v. Schurmeir* (7 Wall. 272)." This case related to rights of a riparian owner upon an inland navigable stream and not upon water where the tide ebbed and flowed, and between which kinds of water a distinction has at times been drawn. Furthermore, the only question involved was whether the common council of the city of Milwaukee could, by merely declaring a pier to be an obstruction to navigation and a nuisance, lay the right for removal, there being no evidence that it was in fact such obstruction or nuisance, and this was the precise issue determined by the learned court. (Page 505.)

Under these circumstances the decision as purporting to define the right of an upland owner, at least upon tide water, to build a pier into the navigable water, has been in effect comprehensively overruled by cases already referred to at length. (*Shively v. Bowby*, 152 U. S. 1, 36, 40; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65.)

And in the *Sage* case (page 78) Judge VANN very pertinently says: "In *Yates v. Milwaukee* (10 Wall. 497) much was said that favors the theory of the plaintiff, but all that was decided is that a wharf built by a riparian owner on the bank of a navigable river in the State of Wisconsin under statutory permit cannot be declared a nuisance without a judicial trial."

The case of *Ill. Cent. R. R. Co. v. Illinois* (146 U. S. 387), which also is cited as an authority in some of the New York cases hereafter to be referred to, requires very little consideration upon the point here involved. What was held in that case was simply that the railroad company, under express authority of the law, having constructed its tracks along the shore of Lake Michigan in such a manner as in no respect to interfere with any useful freedom of the lake for commerce, could not be regarded as having encroached upon

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the domain of the state in such a manner as to require the interposition of the court for the removal of the tracks.

Before passing to the analysis of other New York cases, it is proper to recall that in 1852, in *Gould v. Hudson River R. R. Co.* (6 N. Y. 522) in substance it had been held that the owner of lands on the Hudson river had no property in the shore between high and low-water marks, and, therefore, was not entitled to compensation when the same was taken for the construction of a railroad in such a manner as to shut him off from all convenient access to the water.

This doctrine had been doubted and criticised in various decisions before the decision of *Rumsey v. N. Y. & N. E. R. R. Co.* (133 N. Y. 79), and the court in that latter case was fairly called upon to decide whether it would or would not follow the *Gould* case, for practically the same question was presented in both. The important question involved was the general one, whether an upland owner had any easements and privileges for the destruction of which by the railroad company he was entitled to recover damages. The details of those rights, if any, were not specially in controversy or under consideration. No question of the right to construct a pier into the river was presented except as it might be incidental to and embraced within the general subject.

The court repudiated the doctrine of the *Gould* case, holding that the upland owner did have rights and easements, and then the judge writing the opinion by way of illustration quoted the remarks of Mr. Justice MILLER, in the case of *Yates v. Milwaukee*, already referred to. There was no other statement whatever in the opinion that an upland owner had a right to wharf out into the river, but upon the contrary, in summing up his conclusions, the judge who wrote said: "It must now, we think, be regarded as the law in this state that an owner of land on a public river is entitled to such damages as he may have sustained against a railroad company that constructs its road across his water front and deprives him of access to the navigable part of the stream."

The case of *Saunders v. N. Y. C. & H. R. R. Co.*

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(144 N. Y. 75) involved a consideration of the obligations of a railroad company which had built upon land granted by the state between the upland and the usual place of access by an upland owner to the river, and it was held that such a grant by the commissioners of the land office did not extinguish or impair the easements or riparian rights of such an owner. Again, as in the *Rumsey* case, the question actually involved was the general one of impairment of the rights and privileges possessed by the upland owner. The question was not as to the exact extent of those easements and especially the right to build a wharf into the river was not being considered.

Under those circumstances it is true that the opinion, being written by the same judge who had written in the *Rumsey* case, did state that such rights embraced the right to make a landing wharf or pier for the use of the upland owner or of the public. This statement however, was expressly based upon the proposition that such right had been affirmed in the *Rumsey* case and reaffirmed in the *Illinois Central Railroad* case. There was nothing to suggest the query whether this right to construct a pier was really included in the privileges of the abutting owner, but what was written was but a general definition of a class of rights which, by reference to the authorities cited, was assumed to include the wharfing privilege.

The question in *Thousand Island Steamboat Co. v. Visger* (179 N. Y. 206) was whether a riparian owner upon the St. Lawrence river, owning a dock erected upon land granted by the people of the state of New York for the purpose of promoting the commerce of the state and for no other object or purpose, had a right to the exclusive use of said dock, or whether it was open to the use of all who were engaged in promoting the purposes of the grant, namely, the commerce of the state. That was the precise question involved, and there was none about the right of the riparian owners to maintain their dock in the river. It is true that the opinion, speaking of the fact that the owners or their predecessors had originally built the dock before the grant by the state,

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did state that, "The proprietors of lands upon navigable waters are entitled to a right of access to a navigable part of the river and to the right to make a landing wharf or pier for their own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public whatever these may be," and in support of this proposition cited the *Yates* and *Rumsey* cases. But no issue was being raised in this case as to the right to erect and maintain the dock. The only one was over its use as between the owners and the general public, and I think that this relationship was all that the judge who wrote had in mind when speaking of the right to build "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public."

Thus we find that all of the expressions in these cases tending to support appellants' proposition are rather by way of illustration and amplification of what was essentially involved than otherwise, and moreover that directly or indirectly they are based upon the *Yates* case which, upon this point, can no longer be regarded as authoritative.

Some other cases have been called to our attention in the Appellate Division and at Special and Trial Term, where something has been said affirming the right to build a pier. Whatever was said upon this point was based especially upon the *Yates* case or upon one of the New York cases based upon that case, and with the exception possibly of the *Mould* case, what was said was dictum or part of some general statement of the privileges of a riparian owner and with nothing to suggest the specific question whether the wharfing right was really one of those privileges.

In the case of *People v. Mould* (37 App. Div. 35) it was held, by a divided court, that the state could not compel a riparian owner on the Hudson river to remove a wharf erected by him without having obtained a grant from the state in the shoal waters in front of his uplands and reaching the navigable part of the stream, on the ground simply that it was a pur-

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presture when it was not shown that such wharf was actually a nuisance or an obstruction to navigation. The opinion upon that appeal extensively reviews the authorities upon this subject, the important ones of which have been analyzed in this opinion, and it does affirm the right of an upland owner to wharf out into the navigable water. In view of the space already devoted to the consideration of the authorities upon which this decision is based, it does not seem necessary to review it at length. I can only say that I do not regard its conclusions as sustained by the weight of authority or as furnishing a precedent which should be accepted by this court.

What has been said sufficiently indicates my opinion that the weight of authority sustains the proposition urged by the plaintiffs that under the common law as it prevailed in England and as we adopted and have recognized it in this country, at the time the grants were made to the parties and their predecessors, an upland owner did not have the right to build a wharf over the land below high-water mark into the water, and that in this state the common law has not been changed by statute or usage.

Therefore the judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN and HAIGHT, JJ., concur with GRAY, J.; VANN and WERNER, JJ., concur with HISCOCK, J.

Judgment reversed, etc.

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CHARLES A. PEABODY et al., as Trustees of HENRY ASTOR,  
Respondents, v. LONG ACRE SQUARE BUILDING COMPANY,  
Appellant.

LANDLORD AND TENANT—SUMMARY PROCEEDINGS—DISPOSSESSION  
FOR NON-PAYMENT OF TAXES AND RENT—COSTS. A final order in summary proceedings to dispossess a tenant for non-payment of taxes and rent, awarding delivery of the premises to the landlord "by reason of the tenant's non-payment of said rent and said taxes, together with the costs," is erroneous where it appears that the unexpired term of the tenant was more than five years and that during an adjournment of the proceeding the tenant paid and discharged the taxes. If dispossessed for non-payment of rent he might redeem by paying the rent (Code Civ. Pro.

§ 2256). There is no right to redeem, however, for non-payment of taxes, and having paid them, although after the commencement of the proceeding, he is entitled to a modification of the order by striking out the statement that he was dispossessed for non-payment of taxes, since assuming that separate defaults different in character and results can be united in a single proceeding, the tenant in that proceeding has the right to obtain relief from any of the defaults upon complying with the conditions specified in section 2254 of the Code of Civil Procedure in the same manner as if the proceeding had been brought upon that default alone; and to protect his rights the order should be based only upon the default from which he has not relieved himself; nor is the tenant required to pay the costs of the proceeding at the time of paying the taxes, since they would be included in the judgment dispossessing him for non-payment of rent.

*Peabody v. Long Acre Square Building Co.*, 112 App. Div. 114, reversed.

(Argued February 19, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 6, 1906, which affirmed an order of the Appellate Term affirming an order of the Municipal Court of the city of New York made in summary proceedings, and awarding possession of the premises in suit to the plaintiffs.

The facts, so far as material, are stated in the opinion.

*Alton B. Parker, Warren Leslie and Bennett E. Siegelstein* for appellant. The taxes were paid before the final order was granted, and for that reason the justice erred in including their non-payment as one of the grounds for granting the order. (Code Civ. Pro. § 2256; *Witty v. Acton*, 58 Hun, 552; *Voorhees v. Burchard*, 55 N. Y. 107; *Bergen v. Urbahn*, 83 N. Y. 50; *Frear v. Sweet*, 118 N. Y. 458; *Brady v. Nally*, 151 N. Y. 258; *Eastwood v. Retsof Co.*, 86 Hun, 95; *Bixby v. Casino Co.*, 14 Misc. Rep. 346; *Jarvis v. Driggs*, 69 N. Y. 145.) The appellant had the right to pay the taxes when it did and at any time before a warrant was issued. (Code Civ. Pro. § 2254; *Matter of Flerowellin v. Lent*, 91 App. Div. 430.)

*William G. Choate* for respondents. The decision of the Municipal Court that the order should be for dispossession on

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the ground of non-payment of rent and taxes was correct, notwithstanding the payment by the tenant of the taxes pending the trial. (*Simmons v. Pepe*, 43 Misc. Rep. 661; *Butler v. F. T. Co.*, 186 N. Y. 486; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Garner v. Hannah*, 6 Duer, 262; *Jackson v. Stiles*, 3 Wend. 429; *Giles v. Austin*, 62 N. Y. 486; *Storer v. Chasse*, 9 Misc. Rep. 45; *Matter of Flewellin v. Lent*, 91 App. Div. 430; *Eaton v. Wells*, 82 N. Y. 576; *Jarvis v. Driggs*, 69 N. Y. 145.)

CULLEN, Ch. J. This proceeding was instituted by the respondents, as landlords, against the appellant who held possession of certain premises in the city of New York under a lease for the term of twenty years from November 1st, 1902, at an annual rent until May 1st, 1913, of \$15,200, the tenant covenanting to pay all taxes and assessments. The proceeding was founded on a default by the tenant in the payment of a quarter's rent due on the 1st day of May, 1904, and a failure to pay the annual taxes for the year 1903. The tenant answered and the proceedings were adjourned. Pending the adjournment the tenant paid and discharged the taxes. There was no substantial defense to the allegation of default in payment of the rent. Thereupon the judge of the Municipal Court made a final order awarding delivery of the premises to the landlord "by reason of the tenant's non-payment of said rent and said taxes together with the costs." On appeal this order was affirmed by the Appellate Term of the Supreme Court, and also by the Appellate Division of the first department, in each instance by a divided court, and an appeal is taken to this court by leave of the Appellate Division.

On examining the record it appears that, over the objection and exception of the tenant, the imposition of the tax and its non-payment was proved solely by the evidence of a witness as to what he had seen in the tax roll. It is at least doubtful whether this evidence was competent for the purpose for which it was offered. But as the learned counsel for the appellant asks that the merits of the controversy be decided,

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we shall not discuss the question nor consider the technical objections presented to the Appellate Division. The appellant seeks on this appeal only to modify the final order of the Municipal Court by striking out the statement that the tenant is dispossessed for non-payment of taxes. The objection is not formal but substantial, for by section 2256 of the Code of Civil Procedure where at the time the tenant is dispossessed there remains unexpired five years or more of the demised term, the tenant may within a year redeem by paying the rent in arrears. There is no similar provision in favor of a tenant dispossessed for default in the payment of taxes, and it has been held that there is no right of redemption in such a case. (*Witty v. Action*, 58 Hun, 552.) The appellant contends that it will be barred from any right to redemption by the form of the final order in this proceeding, and, therefore, seeks its modification.

We are of opinion that the appellant was entitled to the modification sought. Summary proceedings to recover the possession of land were first brought into existence in this state by chapter 194 of the Laws of 1820 and were limited to two cases; first, the expiration of the tenant's term; second, default in the payment of rent. In the latter case they could be maintained only where there was not sufficient distress on the premises to satisfy the rent. It was not coextensive with the landlord's right to maintain ejectment, and could not be maintained for a breach of any other covenant of the lease than that to pay rent. (*Oakley v. Schoonmaker*, 15 Wend. 226; *Beach v. Nixon*, 9 N. Y. 35.) In 1846 distress for rent was abolished, and in 1849 the provisions requiring the absence of sufficient distress as a condition for the maintenance of summary proceedings was repealed. The scope of these proceedings has, from time to time, been enlarged so as to include other cases, such as those of a purchaser at a sale on execution or on a foreclosure by advertisement and the like, but it has never been enlarged so as to include generally all cases where ejectment would lie. By chapter 162 of the Laws of 1840 the proceedings could not be maintained when the unexpired

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part of the demised term exceeded five years. The last-mentioned statute was repealed, and in lieu thereof a tenant was given the right of redemption, which still exists under section 2256 of the Code. Under section 2254 whenever a final order is made the tenant may stay the issue of the warrant and further proceedings by payment of the taxes or rent, as to which he may be in default. Therefore, had these proceedings been instituted against the appellant for default in payment of taxes it could have paid those taxes and terminated the proceedings. Had the proceedings been instituted for non-payment of rent then the appellant, though unable to pay the rent, would have a year's time in which to redeem. But the contention of the respondents is that proceedings having been instituted for both defaults, the dispossession of the appellant is final, and it is on this ground that the decisions below have proceeded; that is to say, that in such cases the tenant must pay both taxes and rent or lose all interest in the premises. We cannot accede to this position. By authorizing summary proceedings for non-payment of taxes it could not have been the intent of the legislature to in any degree impair the tenant's right of redemption after a dispossession for unpaid rent. Yet, if the doctrine which has prevailed below is to stand this result has been most effectually accomplished. It is urged that the default in rent and default in taxes was but a single default. We think not. They are essentially different in their character because the results that flow from them are different. The judgment for one cause is for a redeemable annulment of the lease, for the other it is for an irredeemable annulment, therefore the defaults are essentially distinct. By joining both defaults in a single proceeding the tenants cannot be deprived of any right they would have had, had separate proceedings been instituted. If the effect of the joinder is such as the courts below have held, it seems to us a conclusive argument that both defaults cannot be joined in the same proceeding. It is not, however, necessary to determine that question. If separate defaults, different in their character and results, can be united in a

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single proceeding we are of opinion that the tenant must in that proceeding have the right to obtain relief from any of the defaults on complying with the conditions specified in section 2254 of the Code, in the same manner as if the proceeding had been brought on that default alone. To protect its rights it is, therefore, necessary that the final order awarding judgment should specify and be based only upon the default or defaults from which the tenant has not relieved itself. Otherwise the final order or judgment in the proceeding against it would be conclusive against the tenants in other actions. (*Jarvis v. Driggs*, 69 N. Y. 143; *Reich v. Cochran*, 151 N. Y. 122.) The objection that the tenant should have also paid the costs of the proceeding is without force. Judgment would necessarily go against it for the default in the rent and that judgment would include costs. The tenant could not be required to pay these costs twice.

The orders of the Appellate Division and Appellate Term should be reversed and the order of the Municipal Court modified by striking therefrom the reference to taxes, with costs to appellant in this court only.

HAIGHT, VANN, WERNER and CHASE, JJ., concur; GRAY and EDWARD T. BARTLETT, JJ., dissent.

Ordered accordingly.

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THE MANHATTAN LIFE INSURANCE COMPANY, Plaintiff, v.  
GEORGE F. JOHNSON et al., Defendants.

WILLIAM C. DEWEY, Appellant, and FREDERICK T. KELLOGG,  
Respondent.

1. **USURY—VALIDITY OF MORTGAGE DEPENDENT UPON PLACE OF PRINCIPAL TRANSACTION.** The meaning and intent of the Usury Law (1 R. S. 772, § 5, amd. L. 1887, ch. 430) is that the validity of a mortgage is determined by the validity of the agreement of the parties, and such agreement is governed by the law of the place where it is made.

2. **MORTGAGE UPON LANDS IN THE STATE GIVEN AS COLLATERAL TO PROMISSORY NOTES EXECUTED IN A FOREIGN STATE.** A mortgage upon lands in this state, given to secure the payment of promissory notes exe-

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cuted and payable in a foreign state, of which both the parties were residents, although tainted with usury according to the laws of this state, is enforceable, if valid according to the laws of the state where the principal transaction took place.

*Manhattan Life Ins. Co. v. Johnson*, 115 App. Div. 429, affirmed.

(Argued February 19, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1906, which affirmed an order of Special Term overruling exceptions to the report of a referee in surplus money proceedings and confirming such report.

The facts, so far as material, are stated in the opinion.

*Wilbur F. Earp* for appellant. The deed by virtue of which Kellogg claims a lien upon the surplus is usurious and void. (1 R. S. 771, § 1; L. 1879, ch. 538, § 1; 1 R. S. 772, § 5; L. 1837, ch. 430, § 1; *Chapman v. Robertson*, 6 Paige, 627; *Levy v. Levy*, 33 N. Y. 97; *Hosford v. Nichols*, 1 Paige, 221; *Brine v. Ins. Co.*, 96 U. S. 627; *Boyce v. City of St. Louis*, 29 Barb. 650; *Goddard v. Sawyer*, 9 Allen, 78; *Cope v. Wheeler*, 41 N. Y. 303; *Story on Conf. of Laws*, § 293c.)

*Arthur S. Luria* for respondent. The usury laws of New York are not applicable to the deed. (1 R. S. 771, § 1; *Story on Conf. of Laws* [8th ed.], § 287; *De Wolf v. Johnson*, 10 Wheat. 367; *U. S. L. Co. v. Harris*, 113 Fed. Rep. 32; *Bower v. L. Ins. Co.*, 86 Fed. Rep. 748; *Hosford v. Nichols*, 1 Paige, 220; *Cope v. Wheeler*, 41 N. Y. 303; *Williams v. Fitzhugh*, 37 N. Y. 444; *Buckingham v. Corning*, 26 Hun, 473; *Curtis v. Leavitt*, 15 N. Y. 9.)

GRAY, J. This is a proceeding for the disposition of certain surplus moneys arising upon the sale of lands in the city of New York, made pursuant to a decree in foreclosure of the plaintiff's mortgage. The property had been deeded to Kellogg, this respondent, by Dewey, this appellant, as collateral

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security for the payment of the latter's notes. The parties were residents of Springfield, Massachusetts, and the loans of moneys to Dewey were made upon his notes, which were dated and delivered there and made payable at a bank in that city. One of the notes thus given represented a bonus to Kellogg; but all claim upon it was expressly waived. When Dewey deeded to Kellogg the New York real estate to secure the payment of his notes, a stipulation was made between them, reciting the fact of the deed being security for the loans and providing that the property should be re-conveyed to Dewey upon the payment of the notes. Creditors of Dewey brought an action and procured it to be adjudged that, as between him and Kellogg, the deed was a mortgage and that Dewey was the legal owner of the property. Upon the sale had in foreclosure of the plaintiff's mortgage, subject to which the property had been conveyed to Kellogg, the portion of the surplus proceeds applicable upon Kellogg's interest as grantee, or mortgagee, was claimed by him in satisfaction of Dewey's unpaid notes; while Dewey, or his creditors, claimed them upon the ground that Kellogg's mortgage was tainted with usury and was void. The courts below have sustained Kellogg's claim; holding, in effect, that, as it was not shown that the agreement for the loan was usurious under the laws of Massachusetts, the validity of the deed to secure the loan could not be affected, because under the laws of New York the principal transaction would have been avoided for usury. No evidence was given as to the law of Massachusetts concerning usury and it was not attempted to prove the contract to be illegal in that state. The validity of the agreement between the parties, as determinable by the law of the place where made, is conceded; but the appellant insists that, while the notes for the moneys actually loaned may be, legally, indisputable, the deed by way of collateral security is, nevertheless, avoided under our usury law. His argument is founded upon the declaration of our Statute of Usury and upon the authority of the early case of *Chapman v. Robertson*, (6 Paige, 627). The provision of the Usury Law is, that "all bonds.

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bills, notes, assurances, conveyances, all other contracts or securities whatsoever \* \* \* whereupon or whereby there shall be reserved or taken, or secured, \* \* \* any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void." (2 R. S. 772, sec. 5, as amended by L. 1837, ch. 430).

I do not think that this statute has any bearing upon the case of a transaction, or agreement, between the parties, valid in the foreign jurisdiction where made. Under our law the deed by Dewey was perfectly valid on its face and conveyed a perfect title to Kellogg. To establish its invalidity, whether as a deed, or as a mortgage, it was necessary for the former, in order to defend against its operation, to set up and to prove that the instrument was given in pursuance of an agreement, which was usurious and, therefore, vitiated the conveyance. What we are asked to hold is that the law of the place, where the property happens to be, shall govern, rather than the law of the place where the loan was made, of which the conveyance was but an incident. In my opinion, the meaning, or intent, of our usury statute is that the validity of the conveyance, or mortgage, is determined by the validity of the agreement of the parties and I think the law of the place of its making governs as to that. As the defense of usury is a personal one, the conveyance was unassailable, until the defense was set up by the borrower and then the settlement of the issue was referable to the law of the place where the principal transaction was had. The giving of security was but an incident of the agreement of the parties; for it was but a means of securing what was agreed to be done. It did not affect the fulfillment of the agreement and if that is unassailable, how can the defense of usury in the agreement for the loan, or forbearance, of money be made out? Manifestly, it cannot be. The borrower could not show that the loan to him was so affected by usury that the repayment of the principal sum was unenforceable. The case of *Chapman v. Robertson*, (*supra*), if we assume that it

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lays down the rule that the *lex situs* governs, as the appellant contends, is not controlling upon us as an authority. A resident of the state of New York had applied to a resident of Great Britain for a loan upon his bond, secured by mortgage upon New York real estate. In proceedings to foreclose the mortgage, the defense was interposed that by the English law the loan was usurious. Chancellor WALWORTH held that the mortgage "being valid by the *lex situs*, which is, also, the domicile of the mortgagor, it is the duty of the Court to give full effect to the security." That the case was, probably, regarded as exceptional in its facts appears from the statement by the chancellor that "it was a contract partly made in this State and partly in England. And being actually made in reference to our laws and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity." It differs from this case in the respects of the agreement having been, partly, made in England and, partly, here by residents of the respective countries and, also, of the money being payable generally. In this transaction the agreement was, wholly, made in Massachusetts by residents of that state and the money was to be repaid there. The differences may be unimportant and may not be determining. The decision, however, has not escaped criticism, in holding that the contract was to be governed, in the enforcement of the security for its performance, by the *lex situs* and it has been regarded as irreconcilable with other cases. (Story on Conflict of Laws, sec. 293c; *Cope v. McCraney*, 53 Barb. 350; *Dickinson v. Edwards*, 77 N. Y. 573, 586.)

The rule of law upon the facts of this case should be regarded as settled upon very precise authority. In *Cope v. Wheeler*, (41 N. Y. 303), the defendant had made a loan to the plaintiff upon the latter's bond, secured by a mortgage of lands in the state of Wisconsin. The mortgage was foreclosed and a surplus resulted from the sale, to recover which the action was brought. The defense was made that the loan was usurious under our law and that the bond and mortgage

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were avoided. The question was stated as being whether "the bond and mortgage were a New York or a Wisconsin contract." It was held to be a New York contract, because, in the language of Judge JAMES, "at the time of negotiating and executing the \$1,000 bond and mortgage, both parties resided in this state; the agreement for the loan was made here; the instruments were executed here; the money paid here and the excess of interest received here. Although the land covered by the mortgage was situate in the state of Wisconsin, yet neither bond or mortgage named any place of payment and hence the same were payable here, where the parties resided." Judge WOODRUFF, also, speaking in the same case, observed that "nothing is better settled than that the mere fact that collateral security for the payment of a debt, contracted here and payable here, is real property situated in another state does not change the place by the law of which the validity of the contract is to be tested." Further, and pertinently, he observes that "no doubt it is possible for parties in this State to make a contract of loan and advance with such reference to a foreign law, that the latter will govern its construction and legal effect. But that rule does not import, that the parties, by a mere mental operation, can import the law of another state into this for the purpose of altering the character of a loan made here, and to be here returned" etc. The general rule of law in this state is that a "purely personal contract is to be governed by the law of the place where by its terms it is to be performed," (per FOLGER, J., in *Dickinson v. Edwards*, 77 N. Y. at p. 587). The doctrine of *Curtis v. Leavitt*, (15 N. Y. 9), is to the same effect. It has been the general rule that "the validity, the nature, the interpretation and the obligations of contracts are to be governed by the law of the place in which they are to be performed," (*Pope v. Nickerson*, 3 Story, 465), and its application to the case at bar is demanded by every consideration of justice. The disposition of these surplus moneys is made upon equitable principles and it would be highly inequitable to hold, the parties having validly con-

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tracted in their own jurisdiction, that the collateral security for its performance should be defeated because of its situation in a foreign jurisdiction, whose laws would have affected the contract, if made there. But we find, further, authority in point in the decision of the United States Supreme Court, in *De Wolf v. Johnson*, (10 Wheaton, 367). The question arose, in an action for the foreclosure of a mortgage, whether the transaction of the parties, in which the mortgage originated, was tainted with usury in the giving of a premium, or bonus, for the loan. That required a consideration of the effect of an earlier contract, which had been entered into in the state of Rhode Island and which had been secured by a conveyance of land in Kentucky. By the usury laws of the latter state the contract was void; while the laws of the former state merely imposed a penalty for the offense of taking more than six per cent. interest.. So far as it is material to our present discussion, it was held, that "with regard to the locality of the contract of 1815, we have no doubt, that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there and there is nothing that can raise a question but the circumstance of its making a part of the contract, that it should be secured by conveyances of Kentucky land. But the point is established, that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is repayment of the money and the security given is but the means of securing what he has contracted for; which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract." The doctrine of *De Wolf v. Johnson* was followed in *Coghlan v. So. Car. R. R. Co.*, (142 U. S. 101, 110). The rule is similarly stated upon this authority by Judge Story in his work on the Conflict of Laws, sec. 287. Judge Story, in section 293, further states that where the due performance of a contract is secured

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by mortgage upon property situated in any country where the interest is lower, it is not affected "for it is collateral to such contract and the interest being reserved, according to the place where the contract is made and to be executed, there does not seem to be any valid objection to giving collateral security elsewhere to enforce and secure the due performance of a legal contract." Chancellor Kent states the rule that the law of the place where the contract is made is to determine the rate of interest, although the loan is secured by a mortgage of lands in another state; unless there be circumstances to show that the parties had in view the laws of the latter place in regard to interest. (2 Kent's Com. 460.)

I think this case has been correctly decided and, as no other point demands our consideration, I advise the affirmance of the order appealed from, with costs.

EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE JJ., concur; CULLEN, Ch. J., concurs in result.

Order affirmed.

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In the Matter of the Accounting of FRANK R. CALDWELL et al., as Executors of CHARLES W. GARLOCK, Deceased.

ADDIE GARLOCK, Individually and as Executrix, Appellant; ELIZABETH A. GARLOCK, as Assignee of FRANK G. GARLOCK, et al., Respondents.

1. DECEDENT'S ESTATE — WHEN DECREE OF SURROGATE REFUSING TO ALLOW EXECUTRIX COST OF BURIAL LOT MUST BE SUSTAINED. Where a testator owned a burial lot in the cemetery of an incorporated cemetery association, in which there remained sufficient space for the burial of three more bodies, and the executrix, testator's widow, caused his body to be interred in another lot in the same cemetery which she purchased for that purpose, claiming that testator's son had refused to permit the burial of testator's body in the lot owned by him at the time of his death and that he had also refused to recognize her own right to burial therein, a finding of the surrogate, unanimously affirmed by the Appellate Division, that there was no refusal by any person or persons, having an interest in said cemetery lot, to allow the burial of decedent, or his widow, in the event of her death, therein, is conclusive upon the Court

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of Appeals and sustains the propriety of the surrogate's ruling that the purchase price of the second lot was not chargeable against the estate.

**2. SAME — WHEN DECREE OF SURROGATE REFUSING TO ALLOW EXECUTRIX COUNSEL FEES PAID TO ATTORNEYS EMPLOYED BY HER MUST BE SUSTAINED — NOMINATION, BY TESTATOR, OF ATTORNEYS TO PERFORM SERVICES NECESSARY IN ADMINISTRATION OF ESTATE.** While a finding of the surrogate, unanimously affirmed by the Appellate Division, that the services rendered by an attorney, employed by the executrix, were rendered to her personally rather than as executrix, and that all legal services necessary for the administration of the estate were performed by a firm of lawyers, whom testator assumed to appoint for that purpose by a provision of his will, precludes the Court of Appeals from reviewing a ruling of the surrogate, based upon such finding, which disallowed the amount paid by the executrix to such attorney, it must not be understood therefrom that the appointment of attorneys by the will was binding upon the executors; the law of this state does not recognize any testamentary power to control the attorneys or counsel who shall act for them in their representative capacity; such a provision, therefore, is to be regarded merely as expressive of a wish on the part of a testator, which his executors may observe if it accords with their own judgment, but which otherwise they are not bound to regard.

**3. WILL — EQUITABLE CONVERSION EFFECTED BY CODICIL TO WILL — WHEN PROCEEDS OF REAL ESTATE PASS UNDER BEQUEEST OF PERSONAL PROPERTY.** Where testator, by a clause of his will, conferred upon his executors the power to sell and convey any and all of his real estate, and by a codicil thereafter made directed his executors to sell all of his real estate not specifically devised by the will itself and turn the same into money as soon as it might be done for the best interests of his estate; such codicil not only substitutes, for the discretionary power of sale conferred by the will, a positive and absolute direction for the sale of testator's real estate not specifically devised, but also operates as an equitable conversion of the real estate to which it refers and the proceeds thereof should be distributed as personal property under the will; testator's widow is entitled, therefore, to receive one-third of such proceeds, under the clause of the will giving her one-third of testator's personal property, instead of the whole thereof going to testator's son under the residuary clause of the will, by which he devised to his son all of his real and personal estate not specifically bequeathed and devised by prior provisions of the will.

*Matter of Caldwell*, 114 App. Div. 906, modified.

(Argued February 27, 1907; decided March 12, 1907.)

**APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered**

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June 1, 1906, which affirmed a decree of the Onondaga County Surrogate's Court settling the accounts of the executors herein.

The facts, so far as material, are stated in the opinion.

*William Rubin* for appellant. The executors were directed to sell all the real estate not specially bequeathed and turn the same into money. There was, therefore, a conversion of realty into personality. (*Chaplin on Wills*, 457; *Fraser v. Trustee, etc.*, 124 N. Y. 479; *Fisher v. Banta*, 66 N. Y. 476; *Moncrief v. Ross*, 50 N. Y. 436; *McDonald v. O'Hara*, 144 N. Y. 568; *Delafield v. Barlow*, 107 N. Y. 568; *Morse v. Morse*, 85 N. Y. 53; *Lent v. Howard*, 89 N. Y. 177; *Dodge v. Pond*, 23 N. Y. 69; *Hope v. Brewer*, 136 N. Y. 134; *Salisbury v. Slade*, 160 N. Y. 278.) It was the duty of the executrix to have given proper burial to the testator and to have erected a suitable monument at his grave. The law implies a promise on the part of the executor to pay the one who in the absence or neglect of the executor incurs or pays such expense. (*Patterson v. Patterson*, 59 N. Y. 582; *Young v. Young*, 2 Misc. Rep. 381.) The appointment of Wilson & Wortman as attorneys was simply a request and not a direction, as it would be against public policy for executors to be compelled to retain attorneys who might be hostile or adverse in their actions. (*Williams on Exrs.* 115; *Fox's Appeal*, 123 Penn. St. 518; *Matter of Holden*, 126 N. Y. 593; *Redfield on Surr. Pr.* 442; *Matter of Delaplaine*, 19 Abb. [N. C.] 413; *Matter of Hutchinson*, 84 Hun, 593; *Matter of Halsey*, 13 Abb. [N. C.] 354; *Fowler v. Lockwood*, 3 Redf. 465; *Campbell v. Mackie*, 1 Den. 185; *Frith v. Campbell*, 53 Barb. 325; *Matter of T. G. & T. Co.*, 114 App. Div. 778.)

*W. L. Barnum* for respondents. The finding of the court refusing to allow the payments by Addie Garlock of \$191.90 for a burial lot, and \$400 to her personal attorney, was abundantly sustained by the evidence herein. (*Matter of Ogden*, 41 Misc. Rep. 158; *Matter of Quinn*, 16 Misc. Rep.

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651; *Matter of Arkenberger*, 13 Misc. Rep. 744; *Matter of Van Nostrand*, 3 Misc. Rep. 396; *Matter of Holden*, 126 N. Y. 589; *Matter of Hutchinson*, 84 Hun, 563; *Matter of T. G. & T. Co.*; 114 App. Div. 778.) The direction contained in the first paragraph of the codicil of testator's will does not create an equitable conversion and the widow is not entitled to receive any share from the proceeds of the real estate. (*Clemenis v. Babcock*, 26 Misc. Rep. 90; *Matter of Tienkin*, 131 N. Y. 391; *Miller v. Gilbert*, 144 N. Y. 68; *Chamberlain v. Taylor*, 105 N. Y. 185; *Scholle v. Scholle*, 113 N. Y. 261; *Matter of Tatum*, 169 N. Y. 514; *Fraser v. Trustees, etc.*, 124 N. Y. 479; *Fisher v. Banta*, 66 N. Y. 476; *Phelps v. Pond*, 23 N. Y. 69; *Moncrief v. Ross*, 50 N. Y. 431.)

WILLARD BARTLETT, J. This appeal brings up for our consideration the rulings of the surrogate of Onondaga county in respect to three matters in controversy between the widow and executrix of Charles W. Garlock, deceased, on the one hand, and her co-executor and the other parties interested in the estate on the other.

The will of Charles W. Garlock was executed on March 13, 1903. In the first paragraph the testator directed that all his just debts and funeral expenses be paid. In the second paragraph he bequeathed to his wife, Addie Garlock, all his household goods and furniture and jewelry and diamonds, except his diamond stud. In the third paragraph he devised to his said wife the use, rents, income and profits of his house No. 820 East Fayette street, in Syracuse, for and during the term of her natural life if she should remain unmarried, and, upon her death or remarriage, to his son, Frank Garlock, in fee. Then follow various specific legacies until we come to the seventh paragraph, which reads as follows: "I give and bequeath to my said wife, Addie Garlock, one-third of all the rest, residue and remainder of my personal estate of every name and nature whatsoever." By the eighth paragraph the testator bequeathes to his son Frank Garlock his diamond stud.

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The ninth paragraph is in the following words: "I give, devise and bequeath to my son Frank Garlock all the rest, residue and remainder of my estate, both real and personal, of every name and nature whatsoever, to have and to hold unto his sole use, benefit and behoof forever." By the tenth paragraph the devises and bequests made to the testator's wife, Addie Garlock, are declared to be in lieu of dower. The eleventh paragraph confers upon the executors power to lease, mortgage, sell and convey any and all real estate of which the testator may die seized, but contains no absolute direction to sell. By the twelfth paragraph the testator assumes to "appoint Wilson & Wortman, attorneys at law, of Syracuse, N. Y., attorneys for my estate, upon the probate of this my last will and testament, and upon all other matters wherein my executors shall require legal services or advice in the settlement of my estate." The testator's cousin, Frank Caldwell, was appointed executor, and his wife, Addie Garlock, executrix of the will.

On May 23, 1903, the testator executed a codicil, the first paragraph of which reads as follows: "I direct my executors to sell all my real estate not specially bequeathed by my said last will and testament of which I may die seized and to turn the same into money, as soon as it may be done for the best interests of my estate." The codicil contains some specific bequests not involved in this litigation. The only other provision material to be considered is the third numbered paragraph which is in these words: "I give and bequeath to Oakwood, a Cemetery Association of the City of Syracuse, N. Y., one hundred dollars, the annual income thereof to be used for the care of my burial lot in said cemetery."

The burial lot referred to in the codicil had belonged to the testator for many years prior to his death and there were buried therein the body of his first wife, the body of a daughter and the body of a sister-in-law. Sufficient space still remained in this lot for the burial of three more bodies. Instead of burying the body of the testator there his executrix caused his remains to be interred in another lot in the

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same cemetery which she purchased for the purpose at an expenditure of \$191.90; and this amount the surrogate refused to allow her upon the accounting under review. She offered evidence tending to show that her stepson had practically refused to permit the burial of the testator's body in the lot which he owned during his lifetime and also refused to recognize her own right to burial therein. If the findings sustained her position in this respect there can be no doubt that the amount which she expended for the new lot would be a proper charge against the estate. (*Patterson v. Patterson*, 59 N. Y. 574, 582.) The case cited is authority for the proposition that where a deceased person leaves an estate it is the duty of his personal representatives to provide for the reasonable and necessary expenses of the burial of his remains out of such estate. Furthermore under a provision of the Membership Corporations Law "The remains of a widow may be buried in a burial lot of which her husband died possessed and in which his heirs continue to have an estate or right of burial without the consent of any person whomsoever claiming any interest in such lot." (Laws of 1895, chap. 559, § 51, as amended by Laws of 1900, chap. 715.) We have in the present case, however, an express finding by the learned surrogate that the right to bury the said Charles W. Garlock in the lot owned by him at the time of his death was not refused by the executors or by the remaining family of the said Charles W. Garlock, and that there was no refusal by any person or persons having an interest in said cemetery lot to allow the burial of Addie Garlock therein in the event of her death. This finding, sustained as it is by the unanimous affirmation in the Appellate Division, is conclusive upon this court and sustains the propriety of the surrogate's ruling that the purchase price of the second lot was not chargeable against the estate.

The second item in controversy is the claim of the executrix to be allowed \$400 paid to Mr. William Rubin for professional services as an attorney at law. As to this matter also we are precluded by the finding of the surrogate to the effect

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that Messrs. Wilson & Wortman have at all times performed all services necessary for the administration of the estate and his further finding to the effect that the services performed by Mr. Rubin for the appellant, and for which he charged her the sum of \$400, were rendered to her personally rather than as executrix. Such is our construction of his finding upon this subject, from which the words "as executrix" are omitted. While the unanimous affirmation forbids any review of these findings here, it must not be understood that in sustaining this part of the decree we concede the correctness of the proposition argued in the brief for the respondent that the appointment of Messrs. Wilson & Wortman as attorneys of the estate by the twelfth clause of the will was binding upon the executors. The law of this state does not recognize any testamentary power to control executors in the choice of the attorneys or counsel who shall act for them in their representative capacity. They may incur a personal liability for the conduct of their lawyers, and hence they are beyond the control of their testator in making the selection. Such a provision, therefore, as this will contains in reference to the attorneys to be employed is to be regarded merely as expressive of a wish on the part of the testator which it is most proper for the executors to observe if it accords with their own judgment, but which otherwise they are not bound to regard. 7

Proceeding finally to a consideration of the third question presented by this appeal, it seems to us very clear that the appellant is right in respect to the meaning and effect of the first numbered paragraph in the codicil. By that paragraph the testator substituted for the discretionary power to sell conferred upon his executor and executrix by the eleventh paragraph of the will a positive and absolute direction for the sale of all his real estate not specifically devised by the will itself. The direction to his executors to sell which is contained in this paragraph of the codicil is so clear and emphatic as unquestionably to work an equitable conversion of the real estate to which it refers. At the time of his decease the tes-

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tator owned two pieces of land, to wit, No. 820 East Fayette street in the city of Syracuse, and No. 818 in the same street. No. 820 was specifically devised to the appellant for life with a remainder in fee to the testator's son, Frank Garlock, upon the decease of the widow or her remarriage. No. 818 is not expressly mentioned in the will, and if there had been no codicil the effect of the ninth paragraph of the will would have been to devise that house to the testator's son, Frank Garlock. On the other hand, if by reason of the provisions of the first paragraph in the codicil all the testator's real estate except the house devised to his widow for life, is to be deemed converted into personal property then the widow under the provisions of the seventh paragraph of the will which gives her one-third of all the rest, residue and remainder of the testator's personal estate would take one-third of the sum which the executors have derived from the sale of No. 818 East Fayette street. In other words, if an equitable conversion is effected by the first paragraph of the codicil then the proceeds of the sale of No. 818 are divisible under the will as personal property and the bequest to the widow is increased to the extent of one-third of such proceeds.

It would be difficult to find in the reported cases dealing with the subject of equitable conversion a more emphatic direction to sell than that contained in the first paragraph of the codicil here. It is not at all like the case of *Parker v. Linden* (113 N. Y. 28), where the direction for conversion was plainly to carry out other purposes of the will which purposes had failed. There the testator intended that the estate should be converted into personality only in order that an alien brother and sister might take and that purpose was rendered nugatory by the death of such brother and sister before the death of the testator. In the case at bar, however, no purpose of any kind on the part of the testator is disclosed except such as might be inferred from the language of the codicil itself. That purpose must have been to enlarge the personality so that the widow might share therein. It is impossible to account for the insertion of this imperative direction to sell in the very

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beginning of the codicil unless it was designed to benefit the widow. As there was only one piece of real estate in addition to that specifically devised to the widow for life there was nothing upon which the first paragraph of the codicil could operate except No. 818 East Fayette street; and the only conceivable object which the testator could have had in view in placing the direction to sell at the outset of the codicil was his desire to increase the proportion of his estate which was to go to the widow. It seems to us, therefore, that the learned surrogate committed an error in the conclusion of law whereby he found that no equitable conversion arose out of the direction contained in the first clause of the codicil, and that the proceeds of the real estate sold thereunder should not be distributed as personal property. We are of the opinion, on the contrary, that the first paragraph of the codicil did effect an equitable conversion and that the proceeds of the real estate sold therenunder should be distributed as personal property under the will. The result of this view is that the appellant as the widow of the testator is entitled to receive one-third of the moneys realized by the executor from the sale of No. 818 East Fayette street; and that the decree of the Surrogate's Court is erroneous and should be reversed so far as it denies the right of the appellant to that proportion of the sum received upon the sale of that house. The decree should, therefore, be modified so as to adjudge that the widow is entitled to receive one-third of the personal property less the specific bequests made in the will, there being included as part of such personal property the proceeds of the sale of No. 818 East Fayette street. As the widow's right to share in these proceeds is the principal question involved in this appeal we think that considerations of equity demand that she should be awarded costs in all the courts.

The judgment and order of the Appellate Division and the decree of the Surrogate's Court of Onondaga county should be reversed to the extent indicated in this opinion and the proceeding remitted to the Surrogate's Court with directions to modify the decree so as to award to the appellant

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one-third of the proceeds of the sale of the testator's real estate, with costs to the appellant in all the courts payable out of the estate.

CULLEN, Ch. J., EDWARD T. BAETLETT, HAIGHT, VANN, WERNER and Hiscock, JJ., concur.

Judgment accordingly.

**JULIUS JACOBY**, Appellant, v. **HENRIETTA JACOBY et al.**, Respondents, and **SAMUEL JACOBY et al.**, Appellants.

1. WILL — PASSIVE TRUST — WHEN GIFT TO DESIGNATED PERSON, IN TRUST FOR RESIDUARY LEGATEES, FAILS TO CREATE A VALID ACTIVE TRUST. Where a testator, by the first clause of his will, gives to his wife all his estate in trust for the residuary legatees, subject to certain specific legacies, and, by the sixth clause of the will, gives all the residue and remainder of his property to his residuary legatees, naming his wife and four of his children as such legatees, directing "the same to be equally divided and equally shared among them after the youngest child of them shall have attained the age of twenty-one years, and until such time and during his minority I desire that my wife shall receive and have the sole use of the rents and income of my estate after payment of any tax or expense incidental to the use and care of said property," no valid trust is created by such provision; the designated trustee is herself one of the residuary legatees, and not a single trust duty or function is imposed upon her; the projected trust is clearly a passive one, which, under section 73 of the Real Property Law, transmits no title to the trustee, and the estate vests, therefore, in the five residuary legatees named in the will, subject to the wife's use during the minority of the youngest child, or until his earlier death.

2. WILL — WHEN PROVISION SUSPENDING DIVISION OF RESIDUARY ESTATE DURING THE MINORITY OF "YOUNGEST CHILD" NOT IN CONTRAVENTION OF STATUTE FORBIDDING SUSPENSION OF POWER OF ALIENATION. The provision that the property shall be divided among the residuary legatees "after the youngest child of them shall have attained the age of twenty-one years," and that, "until such time and during his minority," the widow shall have the use and income of the estate, does not render the will void (1) because it suspends the power of alienation during a fixed period not measured by lives, and (2) because the same power is suspended during the existence of more than two lives in being; there is nothing in the will to indicate that it was testator's intention to suspend the power of alienation for a fixed period of time; on the contrary, the term used, when given its usual legal meaning, imports simply a suspension during a "minority," and that expression,

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as defined by the statute (Real Prop. Law [L. 1896, ch. 547], § 32), is deemed to signify "a part of a life and not an absolute term equal to the possible duration of such minority;" and the direction that the testator's property "be equally divided and equally shared" among his wife and children, "after the youngest child of them shall have attained the age of twenty-one years," must be construed as of the time of the testator's death, and so construed it plainly refers to the youngest of his children then living, who was in fact his youngest child, and a suspension of the power of alienation during his minority is valid.

*Jacoby v. Jacoby*, 118 App. Div. 918, affirmed.

(Argued March 1, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 27, 1906, which affirmed a judgment of Special Term construing the will of Julius Jacoby, deceased.

The action was brought to obtain a decree adjudging void certain alleged trusts and powers in the will of Julius Jacoby, deceased, and that the decedent died intestate as to the residuum of his property on the ground that the testamentary disposition suspended the absolute ownership and power of alienation of the decedent's estate for a period beyond that allowed by law.

Julius Jacoby died in the borough of Brooklyn, county of Kings, in this state, on the 15th of May, 1901, leaving a last will and testament, the essential parts of which are as follows: "*First*. After all my lawful debts are paid, I give and bequeath all my property of whatever name or kind that I may own at the time of my death to my wife, Henriette Jacoby, in trust for the residuary legatees hereinafter named, subject to the following bequests." This first clause is followed by four others which relate wholly to specific legacies, after which the testator further provided: "*Sixth*. All the residue and remainder of my property, both real and personal, and after the payment of the foregoing bequests I give, devise and bequeath to the following named residuary legatees, namely, to my wife, Henriette Jacoby, Esther Jacoby, Nathan Jacoby, Edward Jacoby and Charles Jacoby, the same to be

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equally divided and equally shared among them after the youngest child of them shall have attained the age of twenty-one years, and until such time and during his minority I desire that my wife shall receive and have the sole use of the rents and income of my estate after payment of any tax or expense incidental to the use and care of said property." The seventh and succeeding clauses of the will are not material to the controversy at bar.

This will was duly admitted to probate, and thereafter this action was brought by the plaintiff, who was one of the testator's four children by a former marriage, against the testator's second wife and the four children of the marriage with her, who are the residuary legatees named in the will.

*Alton B. Parker, Francis A. McCloskey, Charles J. Belfer and Samuel J. Flash* for appellant. The testator by the terms of his will created an active express trust in his wife, Henrietta Jacoby, to collect the rents, profits and income. (*Morse v. Morse*, 85 N. Y. 53; *Sicker v. Sicker*, 23 Misc. Rep. 737; *Vernon v. Vernon*, 53 N. Y. 351; *Tobias v. Ketchum*, 32 N. Y. 319; *Garvey v. McDevitt*, 72 N. Y. 556; *Spitzer v. Spitzer*, 38 App. Div. 436.) The attempted trust in Henrietta Jacoby to receive the rents and profits and apply them to her own use until after the youngest of the four designated minors shall have attained the age of twenty-one years is void, because it suspends the absolute power of alienation beyond two lives in being at the time of his death. (*Ochletter v. Smith*, 41 N. Y. 328; *Haynes v. Sherman*, 117 N. Y. 434; *Herzog v. T. G. & T. Co.*, 177 N. Y. 86; *Hawley v. James*, 16 Wend. 61; *Jennings v. Jennings*, 7 N. Y. 546; *Bindrim v. Ulrich*, 64 App. Div. 444; *Walsh v. Waldron*, 17 N. Y. Supp. 829; 135 N. Y. 650; *C. T. Co. v. Eglesston*, 95 N. Y. Supp. 945; 185 N. Y. 23; Chaplin on *Sus. of Alienation*, § 98.) If the trust attempted to be created is limited to continue until after Charles, the youngest child of them, shall have attained the age of twenty-one years, it is void, because the limitation is dependent not on life but on time.

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(*Staples v. Hawes*, 39 App. Div. 452; *Rice v. Barrett*, 102 N. Y. 162; *Greene v. Greene*, 125 N. Y. 508; *Kalish v. Kalish*, 166 N. Y. 368; *Underwood v. Curtis*, 127 N. Y. 129; Gerard on Titles [3d ed.], 226; *Walsh v. Waldron*, 63 Hun, 315; 135 N. Y. 650; *Haynes v. Sherman*, 117 N. Y. 434; *Hagemeyer v. Saulpaugh*, 97 App. Div. 535; *Titus v. Weeks*, 37 Barb. 136.) The direction that the testator's estate shall be equally divided and equally shared after the youngest of the four children shall have attained the age of twenty-one years, is an attempt to create a future estate which is limited upon an unlawful condition and event, in that it cannot be definitely said until such time in whom the estate will ultimately vest, and there was no vesting in the residuary legatees of Julius Jacoby, deceased. (*Kilpatrick v. Barron*, 54 Hun, 322; *Hennessy v. Patterson*, 85 N. Y. 91; *Haynes v. Sherman*, 117 N. Y. 433; *Everett v. Everett*, 29 N. Y. 39; *Bindrim v. Ulrich*, 64 App. Div. 444; *Greenwald v. Waddell*, 116 N. Y. 234; *Lewisohn v. Henry*, 179 N. Y. 352; *Matter of Crane*, 164 N. Y. 71; *Matter of Baer*, 147 N. Y. 348.) Whether viewed as creating an express trust, a future estate or a power in trust, the will at bar is equally invalid. (*Read v. Williams*, 125 N. Y. 560; *Moncrief v. Ross*, 50 N. Y. 431; *Hetzell v. Barber*, 69 N. Y. 1; *Garvey v. McDevitt*, 72 N. Y. 556; *Tilden v. Green*, 130 N. Y. 29.) The trust provisions constitute a single entire trust and scheme, and the entire trust being void, all its provisions fall with it. It was, therefore, error for the trial court, after declaring the trust void, to attempt to carry out the testator's design by saying that the property vested in the wife until Charles was twenty-one or until his earlier death. (*Tilden v. Green*, 130 N. Y. 29; *Knox v. Jones*, 47 N. Y. 389; *Adam v. Perry*, 43 N. Y. 487; *Garvey v. McDevitt*, 72 N. Y. 556; *Kalish v. Kalish*, 166 N. Y. 368; *Greene v. Greene*, 125 N. Y. 508.)

*Thomas Kelby* and *James W. Ridgway* for *Henrietta Jacoby et al.*, respondents. The will does not create any valid trust, and the residuary legatees take an absolute legal estate.

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(*Rawson v. Lampman*, 5 N. Y. 456; *Fisher v. Hall*, 41 N. Y. 416; *Woodgate v. Fleet*, 64 N. Y. 573; *S. S. Bank v. Holden*, 105 N. Y. 415; *Hopkins v. Kent*, 145 N. Y. 363; *Matter of De Ruyck*, 99 App. Div. 596; *Guental v. Guental*, 113 App. Div. 310; *Denison v. Denison*, 185 N. Y. 438; *Downing v. Marshall*, 23 N. Y. 366; *Greene v. Greene*, 125 N. Y. 506.) The residuum is to be divided when testator's youngest child, Charles Jacoby, reaches majority or dies before that time. (*Matter of Sand*, 63 N. Y. Supp. 67; *Muller v. Struppman*, 60 Abb. [N. C.] 350; *Lung v. Ropke*, 5 Sandf. 369; *Burke v. Valentine*, 52 Barb. 436; *Gilman v. Reddington*, 24 N. Y. 9; *James v. Beasley*, 14 Hun, 520; *Eels v. Lynch*, 21 N. Y. Super. Ct. 465; *Van Cott v. Pren-tice*, 104 N. Y. 45; *Roe v. Vingut*, 117 N. Y. 204; *Howley v. James*, 16 Wend. 61.)

*John M. Zurn* for Edward Jacoby et al., respondents. The power of alienation is not suspended by the will beyond the statutory period. (*Denison v. Denison*, 185 N. Y. 438; *Greene v. Greene*, 125 N. Y. 512; *Hopkins v. Kent*, 145 N. Y. 363; *Roe v. Vingut*, 117 N. Y. 204.) The trust mentioned in the will is not a valid active trust, but a passive trust only, and the residuary legatees obtain the whole estate, both legal and equitable. (L. 1896, ch. 547, § 73.)

**WERNER, J.** The appellants claim and the respondents concede that the first or "trust" clause of the will is invalid, but they do not agree as to the reasons for its invalidity, or its effect upon the rest of the will.

With great elaboration and much force the learned counsel for the appellants contend, in substance, that when the first and sixth clauses of the will are read together, as they should be, it becomes apparent that the trust is void because it involves an unlawful suspension of the power of alienation, which is so inseparably interwoven with all the other essential features of the will as to render the whole instrument void.

The respondents, while conceding the invalidity of the

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trust, contend that it is nullified, not by the statute against unlawful suspension, but by the statutory provisions relating to passive or "dry" trusts, and that its extirpation from the will does not affect the rest of the testator's plan for the devolution of his estate.

By the first clause the testator gives to his wife all his estate, in trust for the residuary legatees, subject to certain specific legacies. The residuary legatees named in the sixth clause are the testator's wife and his four children, Esther, Nathan, Edward and Charles. The property is directed "to be equally divided and equally shared among them *after the youngest child of them shall have attained the age of twenty-one years, and until such time and during his minority,* I desire that my said wife shall receive and have the sole use of the rents and income of my said estate."

No second reading of these two clauses of the will is necessary to demonstrate that they create no valid trust. The designated trustee is herself one of the residuary legatees, and not a single trust duty or function is imposed upon her. The projected trust is clearly a passive one which, under section 73 of the Real Property Law, transmits no title to the trustee, but devolves it directly upon those entitled to the ultimate beneficial estate. (*Rawson v. Lampman*, 5 N. Y. 456; *Fisher v. Hall*, 41 N. Y. 416; *Woodgate v. Fleet*, 64 N. Y. 573.) By the sixth clause the ultimate beneficiaries are the testator's wife and the four children named, subject to the wife's use of the estate during the minority of the youngest child of them. Unless there is something in this sixth clause directing an unlawful suspension of the power of alienation it is, therefore, plain that the estate has vested in the five named residuary legatees, subject to the wife's use during the minority of the youngest child, or until his earlier death, for it is well settled that a term measured by a minority ends upon the death of the minor. (*Roe v. Vingut*, 117 N. Y. 204; *Real Prop. Law*, sec. 32.)

The next question to be considered is whether there is anything in the will which offends against the statute forbidding

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the absolute power of alienation of real property by any limitation or condition for a longer period than during the continuance of not more than two lives in being at the creation of the estate. Counsel for the appellants contend that when the sixth clause is read and construed in connection with the context of the whole instrument, the testator's direction that the widow shall have the use and income of the estate "until such time and during his minority," makes it plain that the testator not only referred to the minority as a fixed period of time, but that the particular minority mentioned is that of the testator's youngest surviving child who shall reach the age of twenty-one years. It needs neither argument nor authority to show that if the will before us can be fairly thus construed, it is irretrievably void, (1) because it suspends the power of alienation during a fixed period not measured by lives, and (2) because the same power is suspended during the existence of more than two lives in being.

We cannot subscribe to the view that there is anything in the will to indicate that it was the testator's intention to suspend the power of alienation for a fixed period of time. On the contrary, the term used, when given its usual legal meaning, imports simply a suspension during a "minority," and that expression, as defined by the statute, is deemed to signify "a part of a life and not an absolute term equal to the possible duration of such minority." (Real Prop. Law, sec. 32.)

Neither is the second contention of the appellants, to the effect that the power of alienation is suspended for more than two lives in being, any more admissible than the first. If we should assume that the phraseology of the will were ambiguous, so that it might be given either of two meanings, it would be our duty to adopt that which will uphold the will. (*Hopkins v. Kent*, 145 N. Y. 367.) Thus if we were in doubt as to whether the division of the testator's property is directed to be made when the youngest of his children shall have arrived at the age of twenty-one years, or upon the majority of the youngest of his children who shall reach that age, we should have to interpret the will as directing the former dis-

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position, because it is valid, as against the latter direction, which is invalid.

It is not necessary, however, to go to that extremity, for we think the testator's language is reasonably clear and unambiguous. He directs that his property "be equally divided and equally shared" among his wife and children, "after the youngest child of them shall have attained the age of twenty-one years." If we apply to this language the rule that the will speaks as of the time of the testator's death, it plainly refers to the youngest of his children then living, who was in fact the testator's youngest child, and a suspension of the power of alienation during "his minority" is unquestionably valid. (*Chaplin on Suspension, etc.*, sec. 100; *Van Cott v. Prentice*, 104 N. Y. 56.) Much more might be written upon the various suggestions so elaborately and ably presented on behalf of the appellants, but it would add nothing substantial to the discussion. In the last analysis every case involving the construction of a will must be decided upon its own particular facts and circumstances, and we have said enough to indicate that we have no doubt as to the validity of this will.

The judgment herein should be affirmed, with one bill of costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN,  
WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment affirmed.

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EMMA CORCORAN, as Administratrix of the Estate of MARGARET CORCORAN, Deceased, Appellant, v. THE CITY OF NEW YORK, Respondent.

1. MUNICIPAL CORPORATIONS—DUTY OF CITY TO KEEP ITS STREETS FREE FROM DANGEROUS DEFECTS—USE OF AUTOMOBILES UPON CITY STREETS. While a municipal corporation is not an insurer of travelers using its streets and owes no special duty to those who ride in automobiles, it is at all times bound to exercise due care to keep its public and much-used streets safe and free from dangerous defects, and such streets may be as freely used by those who ride in automobiles as by pedestrians or other travelers.

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bridge formed a continuation of Jerome avenue and connected it with the island of Manhattan on the south side of the Harlem. At some time in that year the old bridge was removed, leaving Jerome avenue to terminate abruptly as above described, and some six or seven years before the trial of this action the defendant had erected across this abrupt end of Jerome avenue a picket fence about six feet high, which extended across the whole width of the street. This fence was close to the end of the declivity, and converted this part of the street into a *cul de sac*. Extending across a part of the street, at a point about four feet easterly from the fence in question, was what is known as a guard rail, constructed of upright chestnut posts, six inches in diameter, connected at the top and about midway between the ground with two by four rails. After the old bridge had been taken away a new bridge was built across the Harlem river, with its easterly approach commencing near the intersection of Jerome avenue and One Hundred and Sixty-second street, at a point about fifteen hundred feet easterly from the fence at the end of the *cul de sac*. This new approach forms a continuation of Jerome avenue, which now converges southerly on a curve and crosses the Harlem to the south of the *cul de sac*, while the *cul de sac* continues along the old lines of Jerome avenue, which are slightly to the right of and almost parallel with the new approach. The two branches of Jerome avenue thus described form what may be termed an oval which extends to the Harlem river. At this point Jerome avenue is intersected on the northerly side by Ogden avenue and Sedgwick avenue. Ogden avenue runs generally north and south, and enters Jerome avenue about three hundred and fifty feet from the picket fence. Its course is changed on the opposite side of Jerome avenue, where it connects with the approach to the new bridge, forming what is called the Ogden avenue approach. The direction of Sedgwick avenue is approximately east and west, and it enters Jerome avenue still nearer the fence, its curb line on the westerly or lower side being two hundred and forty feet therefrom and practically oppo-

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site the Ogden avenue approach. From the intersection of these two avenues with Jerome avenue the latter continues, as already stated, along the old lines to the abrupt ending at the guard rail and picket fence. This was the physical situation at the time and place of the accident.

On the night in question the plaintiff's intestate with ten others had been at a resort on One Hundred and Tenth street. They left there in two automobiles at between nine and ten o'clock in the evening and went to a roadhouse called Woodward's, at One Hundred and Seventy-seventh street and Jerome avenue. Two of the party left the latter place in one of the automobiles, and the other nine, including plaintiff's intestate, continued there, dancing and singing until about midnight when they entered the remaining automobile. Seven of them got into the tonneau of the vehicle, and the front two seats were taken by the plaintiff's intestate and one Noyes who operated the machine. The party proceeded along Jerome avenue towards the city, and when they had reached the intersection of that avenue with the new bridge approach near One Hundred and Sixty-second street they held to the right or north, following the old lines of Jerome avenue into the *cul de sac*, instead of keeping to the left and going along the new approach to and across the bridge. This explains how they came into collision with the guard rail and picket fence with the result above stated.

The foregoing facts were supplemented by evidence from which a jury might have found that to a traveler in the darkness of the night, who was unfamiliar with that locality, there was nothing to indicate that the street ended at a dangerous declivity not more than two hundred and fifty feet beyond the intersection of Jerome avenue with Ogden and Sedgwick avenues, unless there was sufficient artificial light in the vicinity to plainly disclose the situation. It is obvious, therefore, that the crucial question in the case was whether this dangerous place was sufficiently lighted. As bearing upon that question it was shown that there was an electric light (since removed) on the northerly side of Jerome avenue one hundred and

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seventeen feet from the fence and one hundred and twenty-six feet from the place where the automobile collided with the fence. There were small maple trees on each side of this light, the branches and foliage of which somewhat obscured it. On the left or southerly side of Jerome avenue, at the easterly corner of the Ogden avenue approach and a distance of two hundred and eighty-two feet from the fence, there was another electric light, while there were others further to the south. The new bridge which, viewed from the *cul de sac*, extended diagonally across the Harlem river, was brilliantly lighted, and the lights on the draw span were so directly in front of the traveler coming down Jerome avenue that they might easily have been mistaken for lights that appeared to be placed along a direct continuation of Jerome avenue to the west. The possibility of such a mistake was increased by the fact that the *cul de sac* was paved, guttered and curbed. It was laid with two lines of railroad tracks close up to the fence, and the sidewalks extended on either side to the same point. The guard rail and the picket fence were so weather beaten and dark in color that they were less visible in the night than painted structures would have been. There was evidence tending to show that there was plenty of light on the Ogden avenue approach, but that it cast a very dim reflection toward the fence two hundred and eighty-two feet distant, and that in going from the illuminated zone of the Ogden avenue approach into the more dimly lighted *cul de sac*, the traveler's ability to see surrounding objects plainly was considerably decreased. Something like a month prior to the date of the accident another person or party coming down Jerome avenue in an automobile had crashed into this same fence under similar circumstances, and had reported the accident at a police station. Horses had been frequently heard in the night time to stop suddenly in front of the fence, and there was other evidence from which the jury could have found that it was impossible to see the fence in the night time until very close to it.

Upon such evidence, with all the inferences fairly deduci-

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ble therefrom, it seems to us impossible to escape the conclusion that the case presented questions of fact for decision by the jury. Jerome avenue was one of the public streets of the city of New York. It was, therefore, the duty of the municipality to see that it was at all times kept in a reasonably safe condition for travel thereon. Although it owed no special duty to those who ride in automobiles, and was not an insurer of the travelers using that street, it was at all times bound to exercise due care to keep the highway reasonably safe and free from dangerous defects. (*Hunt v. Mayor, etc., of N. Y.*, 109 N. Y. 134; *Hubbell v. City of Yonkers*, 104 id. 434.) It cannot be said that the city was under any duty to safeguard this dangerous place with a more substantial barricade than the fence and guard rail, for they were doubtless sufficient for ordinary emergencies such as would be likely to arise in the day time in the use of the street by pedestrians or drivers of horses. But the streets of a city may be as freely used by those who ride in automobiles as by pedestrians or travelers, and if this *cul de sac* was likely to be a dangerous place in the night time to any class of wayfarers who might be misled into thinking that it would be a continuation of the highway, it should have been so well lighted as to give fair warning that it was merely a *cul de sac*, or so well guarded as to prevent entrance to the point of danger, for "a public highway may be used in the darkest night; a night so dark that the keenest and clearest vision may not be able to detect obstructions and defects." (*Harris v. Uebelhoer*, 75 N. Y. 175.) We think that the question whether the city had provided sufficient light to enable a traveler at night to discern the guard rail and fence, and to be aware of the danger in time to avert accident, was one of fact. (*Snowden v. Town of Somerset*, 171 N. Y. 99.) The situation disclosed by the record was such as would have warranted the jury in deciding that a traveler, although exercising reasonable prudence and foresight, might meet with an accident at this place in the absence of more effective safeguards than those furnished by the defendant. This conclusion is no less admissible in respect to

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automobiles than of any other kind of vehicle rightfully used upon the public streets. As bearing upon that question the jury would have had the right to consider that at least one similar accident had previously happened at this place to the knowledge of some of the city authorities, and that all the physical conditions surrounding the place of the accident were such as to lull the wayfarer into a feeling of security instead of awakening in him a sense of danger.

We are also of the opinion that the question of contributory negligence was one of fact for the consideration of the jury. The automobile was going at the rate of eight to ten miles an hour, and Noyes was shown to have been an experienced and careful operator. Although the testimony tends to show that this automobile, weighing three thousand pounds, and going at the rate of from eight to ten miles an hour, could have been stopped in from eighteen to twenty feet, it is still a question of fact whether under the conditions which existed the guard rail and fence were visible from a sufficient distance to make such a stop possible. It is true that one of the occupants of the tonneau testified that the fence could be distinguished at a distance of fifteen feet, but that is by no means conclusive, for the plaintiff was entitled to the benefit of the legal principle that a traveler on a city street has the right to assume that all the parts thereof intended for travel are safe, and he is not open to the imputation of negligence if he fails to discern an unknown and concealed danger at the very instant necessary to prevent an impending disaster. (*Brusso v. City of Buffalo*, 90 N. Y. 679; *McGuire v. Spence*, 91 id. 303; *Weed v. Vil. of Ballston Spa.*, 76 id. 329; *Chisholm v. State of New York*, 141 id. 246.)

The judgment should be reversed and a new trial granted, with costs to abide the event.

EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ., concur; CULLEN, Ch. J., HAIGHT and VANN, JJ., dissent.

Judgment reversed, etc.

NORMAN C. HARRIS, Respondent, *v.* BALTIMORE MACHINE AND ELEVATOR WORKS, Appellant.

1. EMPLOYERS' LIABILITY ACT (L. 1902, CH. 600)—PLEADING. It is not necessary, in order to plead a cause of action under the Employers' Liability Act (L. 1902, ch. 600), that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with.

2. SAME—NEGLIGENCE—ACTION BY SERVANT TO RECOVER FOR INJURIES CAUSED BY NEGLIGENCE OF EMPLOYER'S SUPERINTENDENT—SUFFICIENCY OF ALLEGATIONS OF COMPLAINT. Where, in an action brought by an employee of a foreign corporation to recover for injuries sustained by him by reason of the fall of a defective and unsafe elevator, constructed by and then being operated under the supervision and control of the defendant, which the plaintiff had entered in obedience to orders of the defendant's superintendent, the complaint states all the facts necessary to be proved to establish that the negligence which occasioned the happening of the accident was that of defendant's superintendent and then alleges that "within 120 days after the occurrence of said accident \* \* \* and on the 18th day of March, 1903, due notice in writing of the time, place and cause of the injury was given in the manner provided by and pursuant to chapter 600 of the Laws of 1902," such complaint states facts sufficient to constitute a cause of action under the Employers' Liability Act.

*Harris v. Baltimore Machine & Elevator Co.*, 112 App. Div. 389, affirmed.

(Argued March 11, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 24, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Theron G. Strong* for appellant. The complaint fails to state facts sufficient to constitute a cause of action under the Employers' Liability Act. (*Kleps v. B. Mfg. Co.*, 107 App.

Div. 488; *Gmaehle v. Rosenberg*, 178 N. Y. 147; *Ward v. M. R. Co.*, 95 App. Div. 437; *Schermerhorn v. G. F. C. Co.*, 94 App. Div. 600; *Austin v. Goodrich*, 49 N. Y. 266; *Lewis v. Howe*, 174 N. Y. 430; *Braunberg v. Solomon*, 102 App. Div. 330; *Sutherland v. Ammann*, 112 App. Div. 332; *Grasso v. Holbrook*, 102 App. Div. 49; *Brighton v. Clafin Co.*, 180 N. Y. 76.) The court erred in charging the jury as a matter of law on the facts of the case that it was defendant's duty to "use ordinary care and prudence for providing a reasonable safe elevator" for plaintiff's use. (*Perry v. Rogers*, 157 N. Y. 251; *Brick v. R., N. Y. & P. R. R. Co.*, 98 N. Y. 211; *Hartman v. Clarke*, 104 App. Div. 62; *Foster v. I. P. Co.*, 71 App. Div. 47; *Butler v. Townsend*, 126 N. Y. 105; *O'Connell v. Clark*, 22 App. Div. 466; *Brown v. Terry*, 67 App. Div. 223; *Smith v. E. T. Co.*, 89 Hun, 588; *Armour v. Hahn*, 111 U. S. 313.)

*Herbert T. Ketcham* and *Joseph E. Owens* for respondent. The complaint fairly states facts sufficient to constitute every cause of action under the Employers' Liability Act, which was submitted to the jury. (*Brouillette v. C. R. R. R. Co.*, 162 Mass. 198; *Bowers v. C. R. R. R. Co.*, 162 Mass. 312; *Prendible v. C. R. Mfg. Co.*, 160 Mass. 131; *Wall v. B. W. Co.*, 18 N. Y. 119; *Kerr v. Hays*, 35 N. Y. 331; *Stuber v. McEntee*, 142 N. Y. 200.) The instruction to the jury that it was the defendant's duty to use ordinary care and prudence for providing a reasonably safe elevator "for the purpose for which it was being used on the day in question" was proper, especially when considered with the context and general spirit of the charge. (*McGinley v. U. S. L. Ins. Co.*, 77 N. Y. 495.)

GRAY, J. The question of interest to the profession, in this case, is as to the sufficiency of a complaint under the Employers' Liability Act (Laws 1902, ch. 600). This action was brought to recover damages for the injuries sustained by the plaintiff by reason of the negligence of his employer. The complaint

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alleged, in substance, that the plaintiff was directed by the defendant, a foreign corporation, in whose employ he was, to enter an elevator, "which the defendant had constructed and then had under its supervision and control;" that the elevator was negligently constructed by the defendant "in that the steel rope, or cable, by which the elevator car was suspended \* \* \* was loosely \* \* \* and improperly fastened to the top of the car and that the safety appliances \* \* \* had not been attached thereto;" that by reason of the defendant's negligence "in directing the plaintiff to enter the car, while it was in said condition," and without fault on plaintiff's part, the "cable became unfastened from the elevator" and the car fell, and that, by reason of the premises, the plaintiff sustained certain injuries. The final paragraph of the complaint alleged that "within 120 days after the occurrence of the said accident \* \* \* and on the 18th day of March, 1903, due notice in writing of the time, place and cause of the injury was given to the defendant in the manner provided by and pursuant to Chapter 600 of the Laws of 1902."

Upon the trial proof was given upon which the jury returned a verdict against the defendant and the unanimous affirmance by the Appellate Division of the plaintiff's judgment is conclusive upon us that the facts sufficiently supported the verdict. At the opening of the trial, at the close of plaintiff's case and at the close of the evidence, the defendant moved that the plaintiff be compelled to elect whether he proceeded at common law, or under the Employers' Liability Act. The motions were, at first, denied; but, when the evidence was all in, the plaintiff was directed to, and did, elect to proceed under the act, after a suggestion by the trial court that there was no common-law cause of action. The appellant argues that the complaint failed to state facts sufficient to constitute a cause of action under the Employers' Liability Act; that, therefore, his motion to dismiss it for that reason should have been granted, and that the denial was error.

We think that the complaint was sufficient, in the respect argued by the appellant. The Employers' Liability Act

extended the liability of the employer of labor at common law and, in order to sufficiently plead a cause of action thereunder, required, as a condition precedent to a recovery, that notice be given of the accident to the master. It gave an additional cause of action; because it prescribed that a master shall be liable for the negligence of the superintendent, or the person acting as such. (*Gmaehle v. Rosenberg*, 178 N. Y. 147.) At common law such a liability was not recognized; unless the superintending servant was the *alter ego* of the master with respect to the work.

This complaint not only set forth facts showing a defect in the condition of the machinery connected with the employers' business, due to his negligence, but necessarily, as the employer was a corporation, predicated the charge of the negligence from which he suffered, namely, a direction to enter an unsafe elevator, upon the act of one of its servants.

Further, the allegation in the complaint as to notice, specifically, drew the attention of the defendant to the fact that the plaintiff was resting his cause of action, and was depending, upon the provisions of the Employers' Liability Act.

The proofs established that the negligence, which occasioned the happening of the accident, was that of the defendant's superintendent. The failure to insure the safety of the attachment of the cable to the elevator, by fastening the ends properly, was due to his neglect and, when the plaintiff came to work at the place, it was the superintendent who directed him to go upon it for the purpose.

It is not necessary, in order to plead a cause of action under the Employers' Liability Act, that its precise language should be made use of; provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with. That is this case.

The ruling upon the degree of care due from the defendant, with respect to providing a reasonably safe elevator, is to be considered in the light of the facts; which showed it to be one

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in the course of construction and installation. It was in use for the purpose of the work, which plaintiff was directed to perform, on the day in question and the main charge fairly described the situation. The jury could not have been misled upon the subject of the measure of defendant's duty to the plaintiff, nor have supposed that it was greater than an obligation to provide a safe place for the plaintiff to work upon.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT,  
HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
CARLO CIARDI, Appellant.

MURDER—SUFFICIENCY OF EVIDENCE. The evidence upon the trial of a defendant, indicted for murder, examined and held sufficient to sustain a verdict convicting him of murder in the first degree.

(Argued March 5, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Supreme Court, rendered April 11, 1905, at a Trial Term for the county of Tompkins upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

*David M. Dean* for appellant. The verdict is not sustained by the evidence. (*People v. Smith*, 162 N. Y. 520; *Rupert v. B. R. R. Co.*, 154 N. Y. 90; *People v. Kennedy*, 32 N. Y. 141; *People v. Mondon*, 103 N. Y. 211; *People v. White*, 176 N. Y. 331.)

*Willard M. Kent* for respondent.

GRAY, J. The defendant was charged with the crime of murder in the first degree, committed upon Luigi Porgi. His indictment was followed by a trial and he was found guilty by the jury as charged. From the judgment of con-

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viction he has appealed to this court. That the deceased came to his death by violent means was conceded. His body was found, in the early morning of November 30, 1904, in a wood, near the limits of the city of Ithaca, by some laborers. Strewn upon the path, near the spot where the body lay, they had observed a dinner pail, a mitten, a hat and, further on, an overcoat; which led them to the discovery of the body. There were evidences of a struggle having taken place and a narrow strap was about the neck, tightly drawn. The medical evidence established that death had been caused by strangulation. The body was removed to the morgue and the chief of police caused, at once, the arrest of two persons, who roomed with the deceased at a boarding house, kept by a man named Eagles; one of whom was the defendant. Four persons occupied the room and all were Italian workingmen. The two roommates of the defendant and the deceased were named Palagido Todi and Isadoro Dellavecchia. About six o'clock, that morning, all arose, except Todi; who was ill and remained in bed. The first to leave the house was Dellavecchia and he was followed by the defendant. Soon after, the deceased, also, left the house. Todi fell asleep and, later, was awakened by the defendant; who said that it was eight o'clock and asked if he was not going to get up. The fire, which had been lighted in the stove earlier, had gone out and the room was cold. This indicated the absence of the defendant theretofore. The housekeeper testified to hearing the first man, who left the house, pass by her window and proceed towards the highway to the city; which was in the direction of Dellavecchia's work. She remembered that the second man went in the direction of the wood. Eagles, the keeper of the boarding house, testified that he recognized the peculiar step of the deceased, when he went out of the house; proceeding in the direction of the wood. The deceased was the last of the three to leave and, to reach the place of his employment, he had to pass through the wood. A witness testified to meeting the deceased, on his way to work, at a point just above the wood and to his not wearing any overcoat. That

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same morning, and at about the same early hour, some other Italian laborers, passing over the path in the wood, heard, ahead of them, a cry, in their own language, to the effect that "he is killing me." Hastening forward, they came upon the articles of wearing apparel in the path and picked up the overcoat; but, hearing nothing more, threw it down again and hastened forward, until they had joined one of their number, who had gone in advance of them. This overcoat they, and a number of other witnesses, identified as having been worn by the defendant. It was placed upon the body, when it was taken to the morgue. The defendant, when arrested, was brought to the morgue and, upon entering the room, exclaimed: "It is Luigi's coat." The significance of this circumstance is that the room, used for a morgue, was an inside one and so dimly lighted that, while the body and the coat could be seen, objectively, by any one entering, it was impossible, according to the coroner and some other witnesses, to identify the features of the corpse, or the color of the coat.

There was evidence of the deceased having exhibited to a friend, in the presence of the defendant, a black pocket book, containing a number of bills for ten dollars, and for lesser amounts, three days before the homicide. A black pocket book was found upon the defendant's person, which contained forty-one dollars, of which sum a part was in ten-dollar bills. Other evidence showed that, within a few days of the homicide, the defendant stated that he had no money; that he had borrowed one dollar of a friend; that he had suggested stealing from another Italian a sum of some five hundred francs which he knew him to have, and that he had been heard to complain of the deceased having money, which he would not spend. While held in jail, awaiting his trial, he made statements, amounting to confessions of his guilt. The witness Todi, detained in prison as a witness, had an interview with him, in which he told him that he, the defendant, was talked about in connection with the murder, and of its having been his overcoat that was found near the scene. The defendant then made this statement: "I done the murder,

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but there is no witness. Nobody can trouble me. They can't do anything with me." Being asked what he did with Luigi's money, he told the witness that he had hidden it under the ground near Eagles' house. He would not tell him in that conversation the place where it was buried; but, subsequently, he described the spot and told him to bring it and they would divide it. The witness, then, went with the sheriff, the district attorney and two other persons to the spot described and found eighty-three dollars in the ground, wrapped up, as the defendant also had said, in sheets of paper. When Todi, after this, saw the defendant he made some excuse to him for not having been able to get the money; whereupon the defendant asked him to send a man named Graffrei to him, who would know how to get the money and to keep still about it. This was the man, to whom the defendant had previously suggested the stealing of the five hundred francs from a friend. Graffrei had an interview with the defendant, at which he told him where the money was buried and that if he would get the money, he could take out fifty, or sixty, francs. Graffrei was one of those who had recovered the money from its hiding place. In the course of the conversation, the witness remarked upon his having committed the murder and of having left his overcoat in the road. To which the defendant replied that there were others, who would testify that the coat belonged to the deceased. When asked why he did not throw away the overcoat, he said: "Well, I was blind." The defendant told the witness: "If you run away and I am found guilty I can do nothing, but I have three brothers in Italy. They take skin off you." Of another witness, named Lettes, whom the defendant asked to write a letter for him to the "old country," he asked if he was going to be a witness against him. The witness replied that he was and spoke of there being other witnesses and of the overcoat having been identified as belonging to the defendant. The defendant then said: "Even I done the murder, no one was with me. They can't do anything to me."

When the People rested their case, the defendant offered

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no evidence in denial, or in explanation; or to rebut the presumptions to which the evidence might give rise. The trial judge submitted the case to the jurors in a charge, to which no exception was taken and which was perfectly fair to the defendant.

We think that the verdict was warranted by the evidence and that no other could possibly have been rendered upon any reasonable view of the facts. The confessions of guilt were abundantly corroborated by the facts and the circumstances excluded the idea of any one else having committed the crime. Of the four men, rooming together, Dellavecchia had proceeded that morning to his work, in a different quarter and Todi was ill and in bed. The defendant was heard to leave the house in the direction of the wood, through which the deceased would have to pass on his way to his work. In the vicinity of the place of the homicide was found an overcoat, which every one recognized as the one worn by the defendant. That he had not taken away his overcoat is explainable from its having been picked up and carried some distance by the Italian laborers and from its being somewhat before daylight. Upon entering the morgue he exclaimed that the coat upon the body was the deceased's; when objects were difficult to distinguish at a distance. A few days before, he appears to have no money and after his arrest a pocket book was found upon him containing forty-one dollars. The persons to whom he admitted his guilt were not implicated in the commission of the crime and were not shown to have any hostile motive in testifying against him. The fact that a large sum of money in bills was found where the defendant had stated to witnesses he had hidden it, as money taken from the deceased, was not, and could not be, explained upon any theory consistent with innocence. A consideration of the circumstances corroborating the statements of the defendant, which were testified to by witnesses, induces no reasonable, if any, hesitation of the mind to conclude adversely to the defendant's innocence and they sufficiently evidence that the homicide had been committed premeditatedly and deliberately.

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None of the rulings upon the trial presents error, or requires discussion. The trial was fairly conducted and justice was accomplished by the verdict of the jury. I advise the affirmance of the judgment of conviction.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur.

Judgment affirmed.

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**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
LEONARDO BRONCAZO, Appellant.**

MURDER — SUFFICIENCY OF EVIDENCE — APPEAL FOR CLEMENCY  
CANNOT BE CONSIDERED BY THE COURT OF APPEALS — APPLICATION  
MUST BE MADE TO THE GOVERNOR. Where, upon the trial of a defendant indicted for murder, there is evidence sufficient to sustain a verdict convicting the defendant of murder in the first degree, the judgment of conviction must be affirmed; the fact that there are circumstances in the case which tend to lessen the moral guilt of the defendant and should relieve him from suffering the extreme penalty of the law, cannot be taken into consideration by the Court of Appeals; such facts and circumstances must be submitted, on an appeal for clemency, to the governor of the state, to whose judgment, under the Constitution and the law, the whole subject is confided.

(Argued March 4, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Court of General Sessions of the county of New York, rendered October 30, 1906, upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

*Robert Townsend* for appellant. This is clearly not a case of murder in the first degree upon the law or the evidence. (*People v. Keenan*, 101 N. Y. 618; *People v. Leighton*, 88 N. Y. 117; *People v. Majone*, 91 N. Y. 211; *People v. Conway*, 97 N. Y. 75.) The defendant did not use the pistol until he had been struck by the deceased in the groin, which "bent him double." The intention to kill must precede the act by

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some appreciable space of time. (*People v. Majone*, 91 N. Y. 211; *People v. Walworth*, 4 N. Y. Cr. Rep. 355.)

*William Travers Jerome, District Attorney (Robert C. Taylor of counsel), for respondent.* The evidence justified the verdict of murder in the first degree. (*People v. Ferraro*, 161 N. Y. 365; *People v. Furlong*, 187 N. Y. 198; *People v. Conroy*, 97 N. Y. 62; *People v. Schmidt*, 168 N. Y. 568; *People v. Zachello*, 168 N. Y. 35; *People v. Sliney*, 137 N. Y. 570; *People v. Boggiano*, 179 N. Y. 267; *People v. Johnson*, 139 N. Y. 358; *People v. Rodawald*, 177 N. Y. 408.)

EDWARD T. BARTLETT, J. The scene of the homicide was on Christie street, in the city of New York, between Houston and Stanton streets, on the evening of June 1st, 1906.

The defendant, Leonardo Broncado, is an Italian, about twenty-five years old, by trade a painter, unmarried, and at the time of his arrest living in his father's family at 185 Christie street. He was industrious and of good repute. He stands convicted of the crime of murder in the first degree for the killing of one Francisco Lapaglia, on the evening of June 1st, 1906, during a fight, in the course of which the defendant shot the deceased with a pistol inflicting a fatal wound.

It appears that the defendant is of rather frail physique, while the deceased was some ten years his senior and a strong man. The defendant testified that he had been in this country about three years and the deceased some nine or ten years; that he knew the latter in Italy. The evidence is substantially uncontradicted, with a few exceptions to which reference will be made.

It appears that some six months before the homicide, about December, 1905, the defendant and the deceased, with several companions, met in a saloon and engaged in an Italian game of cards known as "tucco." It is unnecessary to describe the game in detail. It suffices to say that the defendant and the deceased had a disagreement, nearly resulting in an affray, and thereafter the deceased, on a number of occasions when meeting the defendant, displayed great hatred

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and bitterness and made charges in the presence of others reflecting upon the chastity of the women in defendant's immediate family; also stated that defendant and his father were dishonored, were cuckolds. It is clear that the deceased and the defendant, owing to their excitable Italian natures, evidently entertained feelings of mutual hatred which rendered their occasional meetings liable to end in violence, if not bloodshed. The defendant testified that on the first of June, the day of the homicide, his employer had notified him that work in the painting trade was slack and that he must find some other job; that he hoped to take him back soon. The defendant at about half past seven o'clock in the evening left his home, 185 Christie street, and proceeded to a bar room on the same block, 216 Christie street, in search of one Dominick Graziano, whom he thought might assist him in obtaining work. He did not find his friend and stepped outside the saloon, intending to wait for him. According to the defendant's story the deceased happened to be in the saloon and followed him to the street, repeating his offensive remarks as to the women of defendant's family — their lack of chastity — and the fact that defendant and his father were cuckolds.

We now approach the fatal encounter, where the evidence is in some respects conflicting. The defendant states that he left the deceased after he renewed the quarrel in front of No. 216 and crossed over and stood in front of another saloon, No. 211, and near the door or hallway of No. 209; that the deceased followed him and forced him into the hallway, drew a knife and threatened his life; that after a violent and stormy interview he made his escape and went down to Stanton street, which is only a short distance, where he met a friend and followed him back to the vicinity of No. 211, where they met the deceased, who immediately attacked the defendant.

The testimony of one Sharp, a witness for the prosecution, is to this effect: That he was walking down Christie street when he saw two men exchanging blows; that there were

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three other men present who attempted to separate the combatants and finally succeeded; two of these men had hold of the deceased and the other man and the defendant walked to the opposite side of the street, a distance of about twenty feet. The witness then states: "I heard the deceased break from the fellows who were holding him, and he went towards the defendant and made a swing at the defendant to hit him, but the man who was standing with the defendant stepped in front of him and avoided him being hit. About that time the deceased made a kick at the defendant, but I do not think he kicked. The defendant then stepped off the pavement, took a revolver from his right hand hip pocket and shot the deceased." This witness, being questioned by a juror, said: "Yes, the deceased came back to attack the defendant, he ran against the defendant in order to attack him again. \* \* \* The defendant, he was still, he was with this peacemaker; he was going to go—he saw the deceased coming towards him, don't you know, he was going to make ready to give him a fight, but the peacemaker was quieting him, and the deceased made a spring at him, and the peacemaker avoided his being hit, and the deceased kicked at him." Another witness for the People swore that the deceased kicked the defendant in the groin, whereupon the defendant shot him.

Ballister, a witness for the defense, thus describes the action of deceased after he freed himself from those who sought to restrain him: "Hardly had Lapaglia got loose when he rushed against Broncado and delivered a kick on him and a blow with the fist on the head. He kicked him (indicating the region of the groin); when Broncado was kicked he doubled up. Lapaglia said when he rushed at Broncado, 'I want to break your horns,' and he was clenching his fist in that moment and rushed against him. He gave Broncado one kick and one blow with the fist. While he (Broncado) doubled up Lapaglia struck the attitude of striking him again, and then I heard the report of a pistol."

The defendant testifies as to this crisis of the fight as fol-

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lows : " While I was under the pain and crying from the blow, I drew the pistol and fired. Just before I fired Lapaglia was again in a striking attitude against me, while I was bent down, and I thought this time he kills me and then I drew the pistol."

It is clear from the testimony quoted that in this last encounter, resulting in the slaying of the deceased, he was the aggressor ; it is also clear that in a physical encounter the defendant was no match for his adversary ; it was an unequal contest. It is also to be remarked that apart from defendant's evidence the People proved the deceased the aggressor.

The question naturally arises why the jury convicted the defendant of murder in the first degree. If the case had rested on this last encounter alone such a result would have been impossible. There was, however, submitted to the jury other evidence that enabled them, if they saw fit, to arrive at the verdict rendered. Two witnesses testified each to a threat the defendant had made to shoot the deceased.

The further fact that the defendant was armed on the night in question was calculated to weigh heavily against him.

The defendant took the stand and denied he had ever made the threats sworn to by the two witnesses for the prosecution ; he also explained how it happened he carried a pistol on the day in question. In regard to the pistol the defendant was corroborated by a gunsmith, Ignazzio Maggio, an unimpeached and disinterested witness. He testified that defendant came to his shop on May 31st, the day before the homicide, and said he had a pistol ; wanted to have it cleaned and sold ; defendant was to bring it to witness' shop the next day ; did so, and found the place locked, and so kept pistol in his pocket. Maggio testified that he often locked the shop in order to do outside work. We thus have conflicting evidence, which justifies the jury in finding one way or the other on all the evidence in the case.

While of the opinion, as above expressed, that the evidence justified the verdict of the jury, and that interference with their determination is not permissible, we fully appreciate

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that there are circumstances in this case, such as the failure of the defendant to use his weapon at the beginning of the altercation, and the fact that the deceased was the aggressor in the final struggle which resulted in the fatal shot, while not controlling the legal character of the defendant's crime, tend to diminish his moral fault, and, on an appeal for clemency, it may be, should relieve him from suffering the extreme penalty of the law. With these considerations we cannot deal. They must be submitted to the governor of the state, to whose judgment under the Constitution and the law the whole subject is confided, and from whom they will doubtless receive due weight.

The following cases illustrate the practice we have adopted : Judge EARL, in concluding his opinion in *People v. Fish* (125 N. Y. 136, 155), said : "A careful consideration of the whole case has constrained us to believe that no error was committed at the trial to the prejudice of the defendant. We think all the elements constituting the crime of murder in the first degree were proved by uncontradicted evidence. The crime was undoubtedly committed, like many others, under the influence of intoxicating liquor, but for which the deadly blow would not have been dealt. We sit here to administer and to uphold and enforce the principles of law and justice applicable to the cases presented to us, uninfluenced by sentiments of commiseration or of mercy. It may be that if we had jurisdiction to listen to an appeal for mercy we would relieve the defendant from the extreme penalty of the law. But such relief can be given only by the governor of the state, to whom very properly, under the circumstances of this case, an application can be made."

Again, in *People v. Kerrigan* (147 N. Y. 210, 215) Judge O'BRIEN said : "The courts, in the administration of criminal justice, are bound by settled rules. If their effect and operation should be mitigated in a particular case by reason of special facts or circumstances, that power rests with the executive department of the government and not with judicial tribunals. There are some features of this case that deserve,

and doubtless will receive, careful consideration in that department."

In *People v. Silverman* (181 N. Y. 235, 240) Chief Judge CULLEN said: "An examination of the evidence affords no reason for doubt that defendant both knew the nature and quality of the act done by him and that the act was wrong. \* \* \* While the defendant's previous malady and infirmities of temper were insufficient to affect his legal responsibility, they may warrant a mitigation of his punishment and his relief from suffering the supreme penalty of the law. An application for clemency, however, must be addressed to the executive branch of the government, by which, doubtless, it will receive proper consideration."

The judgment appealed from should be affirmed.

CULLEN, Ch. J., HAIGHT, WILLARD BARTLETT, Hiscock and CHASE, JJ., concur; GRAY, J., concurs in result.

Judgment affirmed.

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ANNIE SERANO, an Infant, by MICHAEL SERANO, Her Guardian ad Litem, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

1. APPEAL — ORDER OF APPELLATE DIVISION REVERSING JUDGMENT AND GRANTING A NEW TRIAL, "THE FACTS HAVING BEEN EXAMINED AND NO ERROR FOUND THEREIN" — WHAT QUESTIONS OF LAW MAY BE REVIEWED BY COURT OF APPEALS. Where the Appellate Division, by a divided court, reverses a judgment and orders a new trial "upon questions of law only, the facts having been examined and no errors found therein," the Court of Appeals upon an appeal from the order of reversal can review the questions of law that were before the Appellate Division, since such order means that the Appellate Division did not permit the judgment to stand because it reached the conclusion that the most favorable view of the evidence, accepting it as true, fell short of supporting the judgment.

2 INFANT — DEGREE OF CARE REQUIRED THEREFROM. A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence.

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**3. NEGLIGENCE — WHEN NEGLIGENCE CANNOT BE IMPUTED TO PARENTS AS MATTER OF LAW IN PERMITTING CHILD TO CROSS RAILROAD TRACKS UNATTENDED.** It is not negligence as a matter of law for the parents of an intelligent child, somewhat less than six years old, to let her go into the streets in the neighborhood of a railroad crossing unattended, where the child had attended school for about a year and had been accustomed to cross the railroad tracks at the street crossing without attendants and had been told by both parents that in crossing the railroad tracks she should be very careful to look up and down the tracks before crossing to see if a train was coming.

**4. CONTRIBUTORY NEGLIGENCE — WHEN IT CANNOT BE IMPUTED, AS A MATTER OF LAW, TO CHILD INJURED BY TRAIN AT RAILROAD CROSSING.** Where it appears, upon the trial of an action to recover for injuries sustained by a child struck by a locomotive while crossing the tracks of a railroad at a street crossing, that the tracks crossed the street at a curve so abrupt that a locomotive approaching from the east could not be seen until within one hundred feet from the crossing; that, just before the child attempted to cross the tracks, an east-bound train passed over the crossing, obscuring the view to the east, making much noise and leaving behind it a cloud of smoke and steam, and that the child waited for such train to pass, and after looking both ways started to cross the tracks and was struck by a west-bound train, and the evidence is conflicting as to the speed of the train and as to whether the bell was rung or any other warning given, it cannot be held, as a matter of law, that the child was guilty of contributory negligence, and the question of the defendant's negligence is a question of fact, properly submitted to the jury.

**5. QUESTIONS WHETHER INFANT IS SUI JURIS — NEGLIGENCE OF PARENTS IN PERMITTING CHILD TO CROSS RAILROAD TRACKS UNATTENDED — WHEN PROPERLY SUBMITTED TO JURY.** Where all of the questions involved, including the questions whether the child was *sui juris* or not and whether the parents were guilty of negligence in permitting her to cross the railroad tracks unattended, were submitted to the jury, a statement of the court, that, if the jury found that the child exercised such care as would be required of an adult under similar circumstances, any negligence on the part of the parents was not imputable to the child, is not erroneous, since, if a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly negatived. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult.

**6. NEGLIGENCE — SPEED OF RAILROAD TRAIN AT CROSSING — WHEN PROPERLY SUBMITTED TO JURY — INSTRUCTIONS TO JURY.** An instruction, in such charge, that if the jury found the speed of the train was from fifteen to twenty-five miles an hour and they also found that to be a

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dangerous and excessive rate of speed in the locality of this crossing that they might then find the defendant guilty of negligence, is not erroneous, since in the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty-five miles an hour around a very abrupt curve at a much-used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence.

7. **DAMAGES — EXCESSIVE VERDICT.** A determination of the Appellate Division upon the question whether the damages found by the jury are excessive or not is not reviewable in the Court of Appeals, since the court cannot consider the weight of evidence or questions relating to an excessive verdict.

*Serano v. N. Y. C. & H. R. R. Co.*, 114 App. Div. 684, reversed.

(Argued March 6, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 20, 1906, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Udelle Bartlett* and *Thomas L. McKay* for appellant. The verdict of the jury for the plaintiff and the order of reversal of the Appellate Division has established all disputed facts in plaintiff's favor. (*Leslie v. Wiley*, 47 N. Y. 652; *Judson v. C. V. R. R. Co.*, 158 N. Y. 597; *Schryer v. Fenton*, 162 N. Y. 444; *Albring v. N. Y. C. & H. R. R. Co.*, 174 N. Y. 179; *Reich v. Dyer*, 180 N. Y. 107; *Spies v. Lockwood*, 165 N. Y. 481; *Lannon v. Lynch*, 160 N. Y. 483; *Koehler v. Hughes*, 181 N. Y. 507; *Hinckel v. Stevens*, 165 N. Y. 171; *Spence v. Ham*, 163 N. Y. 220.) To sustain the order of reversal it is incumbent upon the respondent to point out some error of law committed on the trial, duly raised by exception, which justifies the reversal, otherwise the order must be reversed and the judgment of the trial court reinstated. (*Vollkommer v. Cody*, 177 N. Y. 124; *Cudahy v. Rinehart*, 133 N. Y. 248; *Butler v. Wright*, 186 N. Y. 259; *Queen v. Weaver*, 166 N. Y. 398; *Spence v. Ham*, 163 N. Y.

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220.) The reversal by the Appellate Division is based solely on the ground that the plaintiff was guilty of contributory negligence as a matter of law and that a nonsuit should have been granted, which is most manifest error, the plaintiff being less than six years old at the time of the accident.) (*Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 620; *Mowrey v. C. C. Ry. Co.*, 51 N. Y. 666, 667; *Swift v. S. I. R. T. R. R. Co.*, 123 N. Y. 645; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Costello v. T. A. R. R. Co.*, 161 N. Y. 317; *Stone v. D. D., etc., R. R. Co.*, 115 N. Y. 104; *Powell v. N. Y. C. & H. R. R. R. Co.*, 22 Hun, 56; *Thurber v. H. B., M. & F. R. R. Co.*, 60 N. Y. 326.) The whole case was properly submitted to the jury. The questions of the speed of the train, as to whether proper or any signals of its approach to the crossing were given, as to whether plaintiff was outside the street and trespassing, and as to contributory negligence, were all questions of fact for the jury. (*Ridgeon v. A. L. Co.*, 37 N. Y. S. R. 514; *Scherer v. H. M. Co.*, 86 Hun, 37; *Volkmar v. M. Ry. Co.*, 134 N. Y. 418; *Hunt v. D. S. & P. Co.*, 100 App. Div. 119; *Massoth v. D. & H. C. Co.*, 64 N. Y. 524; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362; *Miller v. N. Y. C. & H. R. R. Co.*, 92 Hun, 149; 157 N. Y. 688; *Noble v. N. Y. C. & H. R. R. Co.*, 20 App. Div. 40; 161 N. Y. 620; *Salter v. U. & B. R. R. Co.*, 88 N. Y. 42; *Thompson v. N. Y. C. & H. R. R. Co.*, 110 N. Y. 636.)

*Henry Purcell* for respondent. The verdict is not supported by the evidence. (*Albring v. N. Y. C. & H. R. R. R. Co.*, 174 N. Y. 179; *Reich v. Dyer*, 180 N. Y. 107.) The plaintiff was *sui juris*, and this being so, the rule of law that she was bound to exercise care and judgment applies. (*McCarthy v. N. Y. C. & H. R. R. R. Co.*, 37 App. Div. 187; *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 420; *Weiss v. M. S. R. Co.*, 33 App. Div. 221; affd., 165 N. Y.

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665; *Fenton v. S. A. R. Co.*, 126 N. Y. 625; *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308; *Lafferty v. T. A. R. R. Co.*, 85 App. Div. 592; *Stone v. D. D. R. R. Co.*, 115 N. Y. 104; *Hartfield v. Roper*, 21 Wend. 620.)

CHASE, J. On the 29th day of December, 1902, the plaintiff was struck at the Willow street crossing in the city of Oswego by a locomotive attached to a passenger train owned and operated by the defendant. At the time of the accident she was less than six years of age. She brings this action to recover damages for her personal injuries. The fact that an accident occurred is not disputed, but the extent of the plaintiff's injuries and the responsibility of the defendant therefor is denied. The action has been tried twice. On the first trial the plaintiff recovered a verdict. The judgment entered thereon was reversed by the Appellate Division and a new trial ordered, "Upon the ground that the verdict of the jury was against the weight of the evidence," one of the judges concurring in the result, "Only upon the ground that the finding of the jury that the defendant was negligent was against the weight of the evidence." (*Serano v. N. Y. C. & H. R. R. Co.*, 102 App. Div. 621.) On the second trial the plaintiff again recovered a verdict. On appeal from the judgment entered thereon the Appellate Division, by a divided court, reversed the judgment and ordered a new trial, "Upon questions of law only, the facts having been examined and no error found therein." (114 App. Div. 684.) The effect of such an order was considered by this court in *Albring v. N. Y. C. & H. R. R. Co.* (174 N. Y. 179), in which case the court say: "This order \* \* \* means \* \* \* that the Appellate Division reached the conclusion after examining all the evidence that the jury were justified in accepting as true in all instances of conflict in testimony that which was most favorable to the plaintiff, and yet it could not permit the judgment to stand because that most favorable view of the testimony fell short of supporting the judgment."

This court, as said in the case last mentioned, can review

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the questions of law that were before the Appellate Division. Our review is confined to such questions. The plaintiff is the child of poor parents, who for three or four years prior to the accident lived a short distance from the crossing where the accident occurred. She was an intelligent child, and had attended school for about one year prior to the accident. She had been accustomed to cross the tracks of the defendant's road without attendants, and to play with other little girls in the locality of the crossing. She had been told by both her father and mother that in crossing the railroad tracks she should be very careful and look up and down the tracks before crossing to see if a train was coming.

It was not negligence as a matter of law for plaintiff's parents to permit her to go into the street. (*Huerzeler v. Central C. T. R. R. Co.*, 139 N. Y. 490.) Her parents seem to have regarded her as possessing sufficient discretion so that she could go to school and upon errands and to play in the streets unattended. She had sufficient mental and physical capacity so that prior to the day in question she had avoided accidents. The plaintiff was not sworn on the trial and the record does not disclose why she was crossing the defendant's tracks at the time when the accident occurred. The mother testified that plaintiff left the house ten or fifteen minutes before the time when she was brought to the house after the accident. At the crossing in question the defendant has east and west-bound tracks. The general direction of the tracks is east and west and Willow street crosses the tracks so as to make the southeasterly angle of the street line with the tracks about fifty-eight degrees. The locomotive that hit the plaintiff was going west on the west-bound, or northerly, track. The tracks east of the crossing curve sharply to the right and there is a bank with fences and buildings adjoining the railroad tracks on the south. The curve of the defendant's road is such that with an otherwise unobstructed view the engineer sitting on the box on the right side of his locomotive cannot see the crossing until within about forty feet of the same, and the fireman sitting on the

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box on the left side of the locomotive, which is the inside of the curve, cannot see the crossing until within about one hundred feet of the same. It is not claimed that the whistle of the locomotive was blown until a moment before the accident, when it was blown at the same time that the emergency brakes were applied. The defendant claims that the bell had been ringing automatically since the train left the Oswego station, about one-half mile east of the crossing where the accident occurred. An east-bound train had passed over the southerly track of the defendant's road a moment before the accident. The engineer on the west-bound train testified that the locomotives of the two trains passed about one hundred or two hundred feet east of Willow street, and other witnesses confirm his estimate. The defendant claims that the plaintiff was not at the Willow street crossing, but that she was on the defendant's right of way, walking between the rails on the west-bound track about ten to twenty-five feet east of the crossing, and that the engineer and fireman of the defendant's west-bound train saw the plaintiff on the tracks as stated, facing west, when their locomotive was within twenty or twenty-five feet of the plaintiff, and that the train was then stopped as quickly as possible and that the plaintiff as she was stepping off the track was struck by the locomotive and thrown into Willow street. Two other witnesses for the defendant corroborated the defendant's contention. Five witnesses for the plaintiff testified that the plaintiff was on the easterly sidewalk of Willow street, going towards the crossing, and that when she arrived within a few feet of the east-bound track she stopped and waited for the east-bound train to pass, and when it had passed so that the rear of the train was from twelve to seventy-five feet east of the crossing she proceeded across the tracks. The distance between the east and west-bound tracks is eight feet. One witness for the plaintiff, who saw the accident, testified that the plaintiff walked slowly, and when she came to the middle between the east-bound and west-bound tracks that she looked both ways, and that when she came to the last track she

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looked the way from which the train was coming and was then struck. Another witness for the plaintiff, who saw the accident, testified that after the east-bound train had passed about seventy-five feet, the plaintiff looked east and started across the track and was then struck. The defendant's engineer and fireman and eleven other witnesses, all of whom were on the train, with two exceptions, and eight of whom were defendant's employees, testified that the bell on the locomotive was rung. The plaintiff produced five witnesses who were in the vicinity of the crossing, who testified, in substance, that they were in a position where they could hear the bell if rung and that they listened for it, but it was not rung, and that no signal of any kind was given. Other witnesses for the plaintiff testified that they did not hear any signals. Eleven witnesses for the defendant, all but two of whom were upon the train, and a majority of whom were the defendant's employees, testified that the train was running at a speed of from six to eight miles an hour. The plaintiff produced four witnesses, each of whom were in a position where they could observe the train, and one of them testified that the train was running fifteen miles an hour; one that it was running twenty miles an hour, and two that it was running from twenty to twenty-five miles an hour. The train was running up grade, with only twelve or fifteen passengers, and the emergency brakes were fitted to all of the wheels of the train and the train was stopped, as the jury could have found, in about two hundred and twenty feet from where the brakes were first applied. One other fact that the jury could have considered in determining the defendant's negligence and the plaintiff's freedom from contributory negligence, relates to the steam and smoke from the east-bound train that it is claimed concealed the west-bound train. Defendant's engineer testified, in referring to his seeing the plaintiff on track: "I couldn't see her sooner because there was a very sharp curve there. The curve and the approaching train — some steam from the approaching train — but the curve had the most to do hiding my view from her." And he further

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testified: "I saw steam from the other engine, the east-bound engine, as I approached the Willow street crossing, and this girl; it settled; it blew across the west-bound tracks; it cleared up as we approached the girl." The baggage man, who, after the danger signal was given, opened the door of his baggage car on the left-hand side and looked towards the locomotive of his train, testified: "Observed nothing on account of the smoke and steam escaping from the train that we met there." A passenger referring to the east-bound train said: "I didn't see the east-bound train because the steam and smoke came in between the trains." And another that "The smoke and steam from that train going down the east-bound interfered with my view ahead prior to my seeing the girl and the curve itself." Of the two witnesses sworn for the defendant who were not on the train, one, who was west of the crossing, testified: "When the east-bound train went by there was smoke and steam from that point," and the other who was on the west side of the crossing testified, referring to the girl and how she was dressed: "I couldn't tell at that time the smoke and steam from the other train was coming down."

All of the questions involved in the trial, including the question as to whether the plaintiff was *sui juris* or not, and as to the imputed negligence of the plaintiff's parents, were left to the jury in a charge to which, except as hereafter mentioned, there was no exception and in which the court granted all of the numerous requests to charge made by the defendant's counsel. The defendant excepted to a statement by the court that if the jury found that the plaintiff exercised such care as is required of an adult under similar circumstances, that any negligence on the part of the parents was not imputable to the child, and to the charge of the court that if the jury found the speed of the train was from fifteen to twenty-five miles an hour and they also found that to be a dangerous and excessive rate of speed in the locality of this crossing that they might then find the defendant guilty of negligence.

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We find no error in the charge of the court. If a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly negatived. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult.

In the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty-five miles an hour around a very abrupt curve at a much-used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence. (*Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362.)

A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence. (*Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362; *Costello v. Third Ave. R. R. Co.*, 161 N. Y. 317; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 620; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Thurber v. Harlem B., M. & F. R. R. Co.*, 60 N. Y. 326; *Berry v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 289.)

The opinion of the court in the Appellate Division concedes that the record discloses a conflict of fact upon all the questions involved between the parties except the question as to whether the plaintiff was guilty of contributory negligence. In its opinion, referring to the defendant's negligence, the court say that, "By far the greater weight of evidence is to the effect that the speed was not excessive and that the bell was ringing as the train approached the crossing." And also, referring to the amount of the verdict, the court say, "The verdict for the plaintiff on the first trial upon the same evidence as to damages was \$600, and upon this \$5,000. It is grossly excessive."

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The evidence on the former trial is not before us, but even if it were and we were inclined to agree with the Appellate Division as to the weight of the testimony relating to the defendant's negligence, and as to the amount of the verdict, this court cannot consider the weight of evidence or questions relating to an excessive verdict. (*Dimon v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 356, 358.)

As we have stated, we can only consider whether the reversal of the judgment entered upon the verdict should be sustained as a matter of law. We cannot agree with the Appellate Division in holding as a matter of law that the plaintiff was guilty of contributory negligence. In view of the plaintiff's age; the peculiar danger arising from the abrupt curve in the defendant's road; the noise and confusion produced by the east-bound train; the extent to which the view to the east was obscured by the train going east; and the smoke and steam therefrom, it made the plaintiff's negligence under all the circumstances and testimony disclosed by the record, a question of fact which was properly submitted to the jury.

The distinction between the facts in this case and those in cases like *Weiss v. Metr. Street Ry. Co.* (33 App. Div. 221; affd., 165 N. Y. 665); *McCarthy v. N. Y. C. & H. R. R. Co.* (37 App. Div. 187); *Wendell v. N. Y. C. & H. R. R. Co.* (91 N. Y. 420), is apparent upon their recital.

There was some evidence upon each of the questions at issue which required that all of the issues involved in the action be submitted to the jury for their determination.

We have examined the exceptions to the admission and rejection of evidence and do not find any error in the rulings of the court which justified the reversal by the court below.

The order of the Appellate Division should be reversed and the judgment entered upon the verdict affirmed, with costs in all the courts.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT and WILLARD BARTLETT, JJ., concur; GRAY and HISCOCK, JJ., not sitting.

Order reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
MANNIE GLUCK, Appellant.

LARCENY — WHEN RETAINING POSSESSION OF GOODS DELIVERED UNDER CONDITIONAL SALE DOES NOT CONSTITUTE CRIME. Where separate agreements executed at the same time recited, one, that goods consigned were to be returned upon demand, no title to pass; the other, that upon the delivery of the goods the consignee should "deposit" with the consignor a specified sum and thereafter specified weekly sums until the full value of the goods was received, when they should become the property of the consignee, all sums deposited to be the property of the consignor, and if default should be made in any deposit, the latter might deliver to the consignee similar articles equivalent in value to the amount already deposited, and the agreement should then be deemed fulfilled, such agreements must be read together, and so read, constitute a conditional contract of sale (L. 1897, ch. 418, § 10), although each agreement contains a clause that no other agreement should be considered a part thereof. Under such contract, the vendor retains title to the goods and acquires title to all sums paid. Until default in payment, however, the vendee may retain possession. If he defaults, the vendor may demand the return of the goods but must deliver to the vendee similar articles, to the value of the amount paid. A demand unaccompanied by a tender of such articles or of the amount paid does not terminate the contract. The vendee has the right to retain possession of the goods until such tender, and, in the absence thereof, he is not chargeable with larceny for refusing to return them.

*People v. Gluck*, 117 App. Div. 432, reversed.

(Argued March 13, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 8, 1907, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of the crime of grand larceny in the second degree.

The defendant was indicted for the crime of grand larceny in the second degree in that on the fifth day of January, 1906, at the borough and county of New York, being the bailee and agent of one John Behrens, and as such having in his possession a finger ring worth one hundred and seventy-five dollars

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of the goods, chattels and personal property of said Behrens, he "did feloniously appropriate the said goods, chattels and personal property to his own use with intent to deprive and defraud the said John Behrens of the same and \* \* \* did then and there and thereby feloniously steal, etc." There was another count in the indictment for taking said ring by force, but no evidence was given in support thereof and the case was not sent to the jury on that theory.

Upon the trial it appeared that on the fourth of January, 1906, the defendant, who was then about nineteen years of age, applied to John Behrens, a dealer in jewelry, to purchase a diamond ring, and, after selecting a stone, requested that it be properly set. The next day Mr. Behrens delivered the completed ring to the defendant, who paid him five dollars in cash and delivered to him a check for twenty-five dollars drawn on the Bronx Borough Bank by the firm of Grossman & Rohrlich, payable to the order of the defendant and indorsed by him. At the same time the defendant signed a paper in the following form:

"Consigned on memorandum by John Behrens & Company to Mr. Mannie Gluck, New York, January 5th, 1906. The under-mentioned goods are consigned to you to be returned within —— or upon demand. None of them are sold nor does the title thereto pass. Conditions and agreements not expressly herein included shall not be considered as part hereof. All risks are assumed by consignee.

"One 14 Kt Solid Gold Tooth Ring Roman colored, set with solitaire diamond weighing  $3/4\ 1\ 1/16\ 1/64$ , value 175. Goods accepted subject to conditions above expressed."

Another paper, called a "deposit agreement," was signed by both parties when the ring was delivered to the defendant. By that instrument, which recited a consideration of one dollar, it was agreed between the defendant as party of the first part and John Behrens & Company, party of the second part, "that the first party will deposit or cause to be deposited with said John Behrens & Co., party of the second part, thirty dollars upon the execution of this instrument, eight

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dollars January 13th, and three dollars each week thereafter beginning on January 15th, 1906, until the sums so deposited amount to one hundred and seventy-five dollars; that the first party may not at any time withdraw any of said deposits; that each and all of said deposits when made shall be and become the absolute property of said second party; \* \* \* that when said deposit shall amount to one hundred and seventy-five dollars \* \* \* said second party will deliver to said first party to and for his own use forever the following described chattels, viz., one diamond ring. It is further expressly agreed that if the first party at any time defaults any of said deposits, the second party may deliver to the first party articles, as near as may be, of the same nature, manufacture and style as the chattels herein agreed to be delivered but reasonably worth the sums so deposited and upon delivery thereof this agreement shall be deemed fulfilled and satisfied, and it is further expressly agreed that conditions and agreements not expressly included herein shall not be considered as a part hereof." Both papers were dated January 5th, 1906, and both were retained by Mr. Behrens. No copy was delivered to the defendant.

On the 16th of January, 1906, Behrens saw the defendant at his place of business and holding out the consignment memorandum said, "The court requires me to make a personal demand in the presence of a witness and I now demand the return of this diamond ring." The defendant said, "All right. I accept your demand," but he did not give up the ring, which so far as appears was not at the place where the demand was made. Behrens and his son testified that this was all that was said or done on the occasion of the demand, but the defendant testified that he then said he would surrender the ring if Behrens would give him "a release and my \$25 check and the five dollars in cash." The defendant also testified that when he bought the ring the defendant told him the diamond weighed a carat and a fourth; that on the same day that the ring was delivered, he had the stone weighed and upon finding that it weighed much less than was repre-

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sented, he requested the makers of the check to stop payment thereon, and at once offered the ring back to Behrens, provided he would give a release and return the check and cash paid down. He made the same offer at the trial. The check was read in evidence and showed that payment thereof had in fact been stopped. There was nothing to show that the check would not otherwise have been paid. Behrens denied representing that the stone weighed a carat and one-fourth or that the defendant ever offered to return the ring. At some time, but at what date does not appear, he recovered a judgment against the defendant for \$170 damages for the conversion of the ring. There was no evidence showing that the defendant had disposed of the ring, or that he was not in a situation to return it when the demand was made.

This is substantially all the material evidence, and when both parties rested the defendant asked the court "to withdraw the case from the consideration of the jury on the ground that it is not a criminal action, and the People have not made out a cause of action," but the motion was denied and an exception taken. The jury rendered a verdict of guilty of grand larceny in the second degree and the court sentenced the defendant to imprisonment "in state prison, at hard labor for the term of not less than one year and not more than four years." Upon appeal to the Appellate Division the judgment was affirmed, two of the justices dissenting, and the defendant now appeals to this court.

*Isadore L. Pascal* for appellant. Neither the proofs of the People's case herein, nor all the proofs taken together, warranted the submission of the case to the jury. (*People v. Ledwon*, 153 N. Y. 10.)

*William Travers Jerome*, *District Attorney* (*E. Crosby Kindleberger* of counsel), for respondent. The proof given by the People brought the case squarely within the express language of section 528 of the Penal Code, and the defendant was properly convicted of the crime of grand larceny in the

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second degree. (Clark & Russell on Crimes, § 63b; *People v. Flack*, 125 N. Y. 324; *People v. Baker*, 96 N. Y. 340; *People v. Corcoran*, 34 Misc. Rep. 332; *People v. Snyder*, 110 App. Div. 699; *People v. Taylor*, 138 N. Y. 398; *People v. Hoch*, 150 N. Y. 291; *People v. Ferraro*, 161 N. Y. 365; *People v. Egnor*, 175 N. Y. 419; *People v. Rodawald*, 177 N. Y. 408; *People v. Boggiano*, 179 N. Y. 267.)

VANN, J. The Penal Code provides that "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either

" 1. Takes from the possession of the true owner, \* \* \*; or,

" 2. Having in his possession, custody, or control, as a bailee, servant, attorney, \* \* \* or as a person authorized by agreement, \* \* \* to hold or take such possession, custody, or control, any money, property, \* \* \* appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof; steals such property and is guilty of larceny." (Penal Code, § 528.) If the property thus stolen is worth more than twenty-five dollars but not more than five hundred dollars the crime is grand larceny in the second degree. (Id. § 531.)

The question presented by this appeal is whether there was sufficient evidence to warrant the jury in convicting the defendant of the crime thus defined. In civil cases the rule is that a preponderance of evidence is sufficient to establish the fact at issue, but in criminal cases the law requires sufficient evidence to establish the fact of guilt beyond a reasonable doubt. "The presence of some proof is not sufficient to warrant the submission of a criminal case to the jury; and whenever a criminal charge is submitted to the jury, against the objection and exception of the defendant, upon proof which falls below the standard of rebutting the presumption of inno-

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cence and of proving guilt beyond a reasonable doubt, required by the statute (Code Cr. Pro. § 389) to warrant a conviction, a question of law is presented." (*People v. Ledwon*, 153 N. Y. 10, 18; *People v. Owens*, 148 N. Y. 648, 651.) There was no evidence to warrant the jury in convicting the defendant of an intent to steal the ring when he first obtained possession thereof and the case was not tried on that theory. As he was in lawful possession of the ring until the demand was made, at least, the question is whether there was enough evidence to prove that he then intended to deprive the true owner of his property or to appropriate the same to his own use.

The rights of Behrens and the defendant are defined by the consignment receipt and the deposit agreement, which, as they were executed at the same time, between the same persons and with reference to the same subject, must be read together as one instrument. They were drawn by Behrens himself, who filled out a printed blank used by him in his business, and hence any ambiguity therein must be resolved against the one who created it. (*Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54, 59.) What did the parties mean by their contract? "The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." (*Heryford v. Davis*, 102 U. S. 235, 244.)

When the two papers are read together they form a conditional contract for the sale of personal property, or what is commonly called, but not with strict accuracy, a conditional sale. (L. 1897, ch. 418, § 110.) According to its terms, the seller not only retained title to the property agreed to be sold, but also acquired title to all sums paid, while the purchaser promised to pay a certain sum down and the balance in installments. Although the word "deposit" is used, it means pay-

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ment, because it was agreed that each deposit "when made shall be and become the absolute property of said second party." Thus the title to the sums "deposited" passed the same as in the case of money deposited in a bank, but not with the same rights to the so-called depositor, for no debt was created, as it was a partial payment for the ring. The ring was not to belong to the defendant until the purchase price was wholly paid, but still he had a present interest, because he was to become the owner on payment of the balance, and the value of his interest increased with each installment paid. There was no express provision as to possession of the ring in the meantime, but as it was delivered to the defendant when the papers were executed he had the right to retain possession until default in payment. The stipulation that conditions not expressed shall not be considered a part of the agreement does not control the ordinary rules of construction, or the obvious intention of the parties. (*Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 672.)

While the seller had the right to demand possession, he could not exercise that right, as we read the agreement, until the defendant failed to pay some installment. The stipulations relating to demand and default, when read in the light of actual delivery of the ring to the defendant, make the former dependent on the latter. In case of default in making any payment the seller had the right to take advantage of it by demanding the ring, or at his election, to accommodate the defendant by waiting upon his convenience for a longer or shorter period. When the default occurred and the seller made the demand, he thereby brought into action the last clause of the agreement and the demand was not complete until that clause was complied with. After the default he had a right to take possession of the ring and to keep all sums paid, but only on the condition that he should deliver to the defendant "articles, as near as may be, of the same nature, manufacture and style as" the ring and "reasonably worth the sums" paid and upon delivery thereof the agreement was to be regarded as "fulfilled and satisfied." In order to ter-

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minate the contract by demanding the ring the seller was obliged to tender in goods the equivalent of the payments made. He could not keep all benefits received, take the ring also and leave the defendant with nothing but a right of action to get that which the seller had agreed to give. It was not for the purchaser to demand the articles to be given for payments made, but for the seller to offer them when he demanded the ring. The right to make the demand and the obligation to tender restitution or its equivalent in goods were concurrent, and the former was not complete until the latter was performed. As an effective demand would change the situation of the parties it was the duty of the one who wished to bring about that change to do what he had agreed in order to attain that result. A demand when properly made would not rescind the contract, but would "fulfill and satisfy" it as was expressly provided. Any other construction would authorize the purchaser not only to retake the property and keep what had been paid, but also to sue the purchaser for the balance unpaid.

The seller made a demand, but no tender, and hence the relations of the parties remained the same as before. The defendant had the right to retain possession of the ring until the check and money were restored or their equivalent in goods delivered. One-sided as the agreement was from any point of view the seller could not have everything and the purchaser nothing. The latter was entitled to but little at the most, but he could insist upon such rights as he had without being sent to prison for it. He stood upon his rights and the law sustains him in so doing. There was no felonious intent in keeping possession of the ring under the circumstances, and hence he was not guilty of any crime. There was no evidence to warrant the verdict of the jury. The judgment of conviction should be reversed and the defendant discharged.

CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT,  
HISCOCK and CHASE, JJ., concur.

Judgment reversed, etc.

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N. Y. Rep.]Statement of case.

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**MILo BURNS, Respondent, v. OLD STERLING IRON AND MINING COMPANY, Appellant.**

**1. MASTER AND SERVANT—SAFE APPLIANCES—NEGLIGENCE.** An employee who is injured while riding in a "skip" or iron box used in hoisting ore out of a mine, and not intended for passengers, cannot recover damages where the master has provided a safe method of egress from the mine, unless he shows that he was directed to so ride by his superior, or that it had been the custom of the employees to thus use it to the knowledge of the master; nor can a recovery be had in any event in the absence of proof showing some defect either in the appliances or method of construction, and a master is not bound to anticipate that an employee riding in such a "skip" will permit any part of his person to extend beyond its sides.

**2. BEST KNOWN APPLIANCES.** A master is not bound to use the best known appliances, but only such as are reasonably fit and proper.

*Burns v. Old Stirling I. & M. Co.*, 105 App. Div. 627, reversed.

(Argued March 15, 1907; decided April 2, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 31, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Henry Purcell* and *John C. Trolan* for appellant. The defendant was not negligent. (*Morris v. Brown*, 111 N. Y. 318; *Sellick v. Langdon & Co.*, 55 Hun, 19; *Cleary v. Blake*, 14 App. Div. 602; *Del Sejnore v. Hallman*, 153 N. Y. 274; *Barrett v. L. O. B. Imp. Co.*, 68 App. Div. 602; *Quinn v. Baird*, 49 App. Div. 270; *Daley v. Brown*, 45 App. Div. 432; *Gorman v. White*, 19 App. Div. 324; *Hoehmann v. M. E. Co.*, 4 Misc. Rep. 160; *Dobbins v. Brown*, 119 N. Y. 188.) The measure of the defendant's duty was the exercise of a reasonable degree of care for the protection of its servant, the plaintiff, and if it adopted all the precautions

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that a reasonably prudent man would have under the same circumstances it cannot be held liable. (*Dobbins v. Brown*, 119 N. Y. 188; *Pantzar v. T. F. I. & M. Co.*, 99 N. Y. 368; *Burke v. Witherbee*, 98 N. Y. 562; *Probst v. Delamater*, 100 N. Y. 266; *Hickey v. Taffe*, 105 N. Y. 26; *Sweeney v. Envelope Co.*, 101 N. Y. 250.) The plaintiff was guilty of negligence as matter of law. (*Williams v. D. R. Co.*, 116 N. Y. 628; *Wiwirowski v. L. S. R. R. Co.*, 124 N. Y. 420; *Swenson v. M. I. Co.*, 24 N. Y. S. R. 43; *O'Brien v. W. S. Co.*, 100 Mo. 182; *Hoehmann v. M. Eng. Co.*, 4 Misc. Rep. 160; *Morris v. Brown*, 111 N. Y. 318; *Dale v. D. R. Co.*, 73 N. Y. 468; *Hallahan v. N. Y. R. Co.*, 102 N. Y. 194; *Breen v. R. R. Co.*, 109 N. Y. 297; *Vrooman v. Rogers*, 132 N. Y. 167.)

*Arthur W. Orvis* for respondent. The defendant was negligent in maintaining this dangerous chute, allowing its employees to ride up and down in the skip and in not promulgating and enforcing adequate rules to prevent employees riding therein while the chute was in its position in the mine. (*Ford v. L. S. & M. S. R. R. Co.*, 124 N. Y. 493; *Doing v. O. & W. R. R. Co.*, 151 N. Y. 580; *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332; *Abel v. D. & H. C. Co.*, 128 N. Y. 662; *Eastwood v. R. M. Co.*, 86 Hun, 92; 152 N. Y. 651; *Pantzar v. T. F. M. Co.*, 99 N. Y. 368; *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544; *Hunter v. O. & W. R. R. Co.*, 116 N. Y. 615; *Weber v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 587.) It was not negligence on the part of plaintiff to ride in the skip, as the other employees were permitted to do. (*Stuber v. McEntee*, 142 N. Y. 200; *Johnson v. H. R. R. Co.*, 20 N. Y. 65; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 464; *Kain v. Smith*, 89 N. Y. 375; *Hayes v. Bush*, 41 Hun, 407; *Corcoran v. Holbrook*, 59 N. Y. 517; *Harris v. Uebelhoefer*, 75 N. Y. 169; *Sprong v. B. & A. R. R. Co.*, 58 N. Y. 56; *Stringham v. Stewart*, 100 N. Y. 516; *Francis v. N. Y. S. Co.*, 114 N. Y. 380; *Rosenberg v. Schooler*, 101 N. Y. Supp. 505; *Francis*

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v. N. Y. S. Co., 114 N. Y. 380; Schineer v. Gas Light Co., 147 N. Y. 529.)

WERNER, J. The defendant is a domestic corporation engaged in mining iron ore in two mines known as the "Old Sterling" and the "Dickson," both of which are located on the R. W. & O. branch of the New York Central railroad, about two miles from the village of Antwerp in the county of Jefferson. The plaintiff commenced work for the defendant at the Dickson mine in December, 1901, and continued until the time of the accident, which occurred on the 9th day of April, 1902. The general charge of negligence against the defendant set forth in the complaint is, that the defendant failed in its duty to provide the plaintiff with a good, safe and secure place to work, and the specification in that behalf is, that the defendant negligently and carelessly constructed and suspended an ore chute in a shaft used as a passageway for a car called a "skip," by means of which ore was elevated from the mine to the surface of the earth, where it was sorted and loaded on railroad cars for shipment; that the ore chute as thus constructed was dangerous to the life and limb of persons riding in the skip; and that the plaintiff, while riding in this skip at the direction of the defendant and in the performance of duties which were a part of his work, caught his hand between the edge of the skip and the platform of the chute referred to, in such a manner that his hand and arm were crushed and permanently crippled.

The record discloses that the plaintiff's work consisted in sorting the ore after it had been elevated from the mine and dumped in the car. This duty was performed in a building called the "top-house," which had been erected over a branch railroad track extending into the defendant's premises. Close to the "top-house," and practically at right angles with the railroad siding, was the main shaft of the mine, extending into the earth at an angle of about fifty-seven degrees, to a depth of about one hundred and eighty feet. This shaft was from six to eight feet in diameter and was equipped with a

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track upon which the car or skip was drawn back and forth by means of a cable, which was operated by an engineer in a power house so placed that the engineer could see when the skip reached the "top-house." The power house was connected with the two levels or floors of the mine by wires and bells, by means of which signals were transmitted to regulate the operation of the skip. The skip, which was described as being like an oblong box with the top off, was constructed of boiler iron, and its dimensions as it rested upon the track were about three feet in width, about three and one-half feet in height, and from four to five feet in length. In its operation through the shaft it had an unobstructed passage with ample room on all sides of it, except at a point about seventy-five feet below the surface of the earth, where the mine had formerly been worked upon what is known as the "upper level." At this point a platform had been constructed across the shaft with an opening in it just large enough to permit of the passage of the skip. This platform was designed to be used as a chute by means of which the ore mined on the "upper level" could be loaded into the skip, and the reason for making the opening in the chute just large enough for the passage of the skip, was to prevent pieces of ore from falling down into the shaft to the danger of the workmen employed in the lower level. The upper level, which had been worked for many years, was not in use at the time of the accident and had not been used for several months prior thereto, except for the purpose of removing some odds and ends of ore that had previously been mined. During the time when this upper level had been in active use the shaft, at the place where it was intersected by the chute had been lighted by electricity, but was not lighted at the time of the accident, and that particular place in the shaft was described by one of the witnesses as being "somewhat dark; about like dusk."

The record further discloses that the "top-house" in which the ore was sorted was open at both ends, so that the men engaged in sorting ore were exposed to the inclemencies of the weather. For the purpose of avoiding this, if possible,

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the defendant's superintendent had instructed the plaintiff to go down into the mine at his convenience to ascertain if it would be practicable to sort the ore in the mine with the aid of electric light. On the day of the accident the plaintiff, being temporarily disengaged, went down in the skip with one Watson, the defendant's master mechanic, and after remaining in the mine about fifteen minutes the plaintiff and Watson and one Phillips entered the skip, the signal was given, and the skip was started on its upward journey. The plaintiff instead of keeping his whole body within the skip, rested his hand or arm upon the top so that it projected over the side and when the skip reached the upper level the plaintiff's arm was caught between the skip and the chute and crushed as above stated. The plaintiff testified that he had never been down the shaft before ; that he did not know of the existence of the chute ; that the shaft was so dark that he could not see ; and that he had not been warned either by Watson or any one else that it was dangerous to permit any portion of his body to extend beyond the sides of the skip. He admitted that he had not been directed to use the skip in going into the mine ; that he had entered it at the request of a fellow-servant ; and that the defendant had provided a system of ladders which were well lighted, in good repair and commonly used by the workmen in going and coming from the mine. There was evidence tending to show that the skip had been used at various times by at least five of the defendant's employees, but it did not appear that this was known to the defendant's superintendent. The skip and chute in question had been in use during a period of about eighteen years without accident until the plaintiff was injured. At the Trial Term the plaintiff recovered a verdict and the judgment entered upon it was affirmed at the Appellate Division.

In submitting this case to the jury the learned trial judge charged that there were two preliminary questions to be considered, upon both of which there must be an affirmative finding in favor of the plaintiff before the general questions of the defendant's negligence and plaintiff's freedom from con-

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tributary negligence could properly be determined. The first of these preliminary questions was whether the skip in which the plaintiff was injured was "an appliance furnished by the master for the use of its servants in the way that it was used on this occasion;" and the other was "whether the plaintiff was at the time of the accident rightfully in this mine at all." In respect of this latter question the jury was properly charged that if the plaintiff "had no business there, if he was simply there for his own amusement, there can be no recovery in this case. In that event he was, if not a trespasser, yet not in the service at that moment of the defendant, and the defendant owed no duty to him with regard to this skip which the evidence shows it did not perform." As there was some evidence to support the plaintiff's contention that on the occasion of the accident he went into the mine in obedience to directions given him by Jameson, the defendant's superintendent, there was as to this branch of the case a question of fact for the jury. We think, however, that no issue was presented upon the other question whether the skip "was an appliance furnished by the master for the use of its servants in the way that it was used on this occasion," and that upon this feature of the case the trial court should have decided against the plaintiff as matter of law. It is conceded that the skip was not a passenger elevator, but was simply an iron receptacle in the form of a box to be used in hoisting ore from the mine to the "top-house." The mine, as we have seen, was equipped with a system of ladders which were well lighted, kept in good order, and commonly used by the defendant's employees in going to and coming from the mine. The plaintiff had never ridden in the skip before the occasion when he was injured, and he entered it then, not by direction of the defendant's superintendent, but upon the invitation of a fellow-servant. As there was no direct evidence tending to show that the skip, which was obviously unsuitable for safe and comfortable passenger service, was used by the workmen employed in the mine at the express command or with the affirmative assent or knowledge of the

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defendant, the plaintiff attempted to show such a general use of the skip for that purpose as to charge the defendant with constructive notice of the fact. In this we think the plaintiff failed. There is no evidence that any of the ordinary employees of the defendant ever rode up and down in the skip in the presence of Jameson, the superintendent, or that any such use of it was ever brought to his attention. It is true that the defendant and several of the witnesses testified to the use of the skip by several of the employees, but when this evidence is carefully analyzed it falls far short of establishing such a general custom as to charge the defendant with notice or knowledge from which consent may be implied. At the time of the accident there were from twenty-five to thirty men employed in the mine, and there were periods when there were many more. There were only five employees who, according to the evidence adduced in behalf of the plaintiff, had used the skip in going to and coming from the mine. These were Watson, the master mechanic; McCormick, the mine boss; Phillips, the blacksmith; Whitford and Connolly, miners. It is quite apparent that the duties of the first three of these employees were of such a special nature as to necessitate frequent trips to and from the mine during working hours, and for aught that appears they may have used the skip with the express consent or at the direction of the defendant's superintendent. The evidence upon this subject almost raises the presumption that these three were not in the category of ordinary employees, for Phillips, the blacksmith, testified: "When I say that I used to take the time of the men as they went down in the shaft, I mean the ladder shaft. I never saw any men going down the skip shaft at any time when they went down to their work." It will thus be seen that after eliminating Watson, McCormick and Phillips, whose special duties placed them in a class by themselves, Whitford and Connolly are the only employees who are shown to have used the skip in riding to and from the mine. In that connection Whitford made an extremely significant admission when he said: "I do remember one occasion when I was

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going down into the Dickson mine in the skip. I saw Mr. McCormick and he told me I must not go down there. He told me it was against the rule to go down in the skip."

In the consideration of the question now under discussion we have not adverted to the evidence tending to show that the defendant had posted notices warning its employees against the use of the skip, for as to that there was room for conflicting inferences from which a jury might have concluded either that the notices were not as explicit as they should have been, or were not so placed upon the premises as to clearly indicate the skip as one of the appliances with reference to which warning was intended to be given. After eliminating all evidence of that character, and taking the plaintiff's case in its strongest possible aspect, we think it would be going too far to hold that there was evidence upon which a jury should have been permitted to find that there had been such a general use of the skip by the defendant's employees for the purpose of riding to and from the mine as to charge the defendant with notice, and thus fasten upon it a legal liability for a failure to provide such safeguards as might have been deemed necessary, if the skip had been generally used for passenger service with the defendant's knowledge or consent. We, therefore, think it was error to send the case to the jury, and that the plaintiff should have been nonsuited.

There is, however, another angle from which this case may be looked at, but the result is equally fatal to the plaintiff. If we assume for the purposes of this discussion that the plaintiff was rightfully in the mine in the performance of some duty delegated to him by the master, and that the skip was an appliance which was generally used by the workmen in going to and returning from the bottom of the shaft, so that the plaintiff might properly have concluded that he was also entitled to use it for the same purpose, the question which first presents itself is whether the defendant was guilty of negligence; in other words, whether it omitted to perform any duty in this behalf imposed upon it by law. The only negligence attributed to the defendant by the complaint is, that it

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negligently and carelessly allowed the ore chute in question to be improperly, negligently and dangerously suspended in such a manner above the track over which said skip passed as to be dangerous to the life and limb of persons traversing through said shaft in said skip. According to the evidence the skip and chute had both been used for eighteen years without accident until the plaintiff was injured. There is not a word of testimony in the record which tends to show that the chute as constructed was an improper or unsafe appliance. On the contrary, it appears that it would not have answered the purpose for which it was designed if the opening therein for the passage of the skip had been larger than it actually was. It was intended to fit so closely that when the skip was being loaded at the chute there could be no danger of dropping ore into the mine below. The plaintiff's proof, therefore, does not support the allegation of his complaint, and the record seems to indicate that the jury found the defendant guilty of negligence because it failed to warn the plaintiff of the danger in the use of the skip. Thus it appears that the cause of action alleged was not proved, and that which was proved was not alleged. In this respect the case at bar resembles the case of *Dobbins v. Brown* (119 N. Y. 189), where it was held that the mere breaking of an appliance which was not proven to be defective in plan or structure did not justify an inference of negligence where the only charge in the complaint was that the machinery, appliances and apparatus used by the defendants in their work for communication between the surface of the earth and the bottom of the shaft were unsafe, defective and insecure.

But, aside from all this, the evidence tended to show that both the skip and the chute were well adapted to the purposes for which they were primarily intended to be used. There was nothing inherently dangerous in the plan or method of their construction. Neither of them were shown to have been out of repair. It may well be that both might have been improved upon, but this is not the test of the defendant's duty or liability. A master is not bound to furnish the

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best known appliances for the work in which his servant is employed, but only such as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would employ, having regard to his own safety if selecting them for his individual use. (*Hickey v. Taaffe*, 105 N. Y. 26; *Stringham v. Hilton*, 111 id. 188; *Harley v. Buffalo C. M. Co.*, 142 id. 31.) The application of this general rule to the case at bar is most obvious. Even if the evidence could be regarded as sufficient to charge the defendant with knowledge that the skip was generally used by its employees for the purpose of riding to and from the bottom of the shaft, it cannot be said that the defendant, in the exercise of reasonable care and prudence, was bound to anticipate that an employee using it for that purpose would permit any part of his person to project beyond the sides of the skip. On the contrary, the size and structure of the skip, the primary purpose for which it was used, and the general character of the shaft in which it was operated, may well have led the defendant to assume that any employee who should venture to ride in it would realize that he could only be safe by keeping his whole person within it. This appeals to us as the reasonable and rational view of the case, and to overcome it we must have something more than mere surmise or speculation.

We think the judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, VANN, WILLARD BARTLETT and CHASE, JJ., concur; HISCOCK, J., not sitting.

Judgment reversed, etc.

In the Matter of the Application of WILLIAM L. SHEERRIL, et al., Appellants, for a Writ of Mandamus against JOHN F. O'BRIEN, Secretary of State, Respondent.

In the Matter of the Application of WALTER PENDLETON, Appellant, for a Writ of Mandamus against JOHN F. O'BRIEN, Secretary of State, Respondent.

In the Matter of the Application of GEORGE E. PAYNE et al., Appellants, for a Writ of Mandamus against JOHN F. O'BRIEN, Secretary of State, Respondent.

1. **LEGISLATIVE APPORTIONMENT—JURISDICTION OF SUPREME COURT.** The Supreme Court has express jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the Constitution, and, if such conflict is found to exist, to declare the act void. (Const. 1894, art. III, § 5.)

2. **REVIEW BY COURT OF APPEALS.** While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191.) Upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted.

3. **POWERS AND LIMITATIONS OF THE LEGISLATURE.** Although an act of the legislature is the voice of the people speaking through their representatives, the authority of the representatives in relation to an apportionment is a delegated authority wholly derived from and dependent upon the Constitution; no general power is vested in the legislature to change or modify the number of its members or the districts from which they are to be elected; the provisions of the Constitution constitute the full authority of the legislature; an examination of the Constitutions of the State from the first, adopted in 1777, to the last, adopted in 1894, together with the proceedings of the constitutional convention of 1894, shows an intentional and gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon its power in the matter of apportionment, so that only the minimum of discretion, necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the Constitution, is left to the legislature.

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**4. LIMIT OF LEGISLATIVE DISCRETION.** The limit of legislative discretion in the division of the state into senatorial districts is to make as close an approximation to equality in the number of inhabitants as is reasonably possible. (Const. art. III, § 4.)

**5. APPORTIONMENT OF SECOND SENATORIAL DISTRICT INVALID.** The formation of the second senatorial district by the joinder of Richmond and Queens counties violates the Constitution. Although by the uniform and consistent action of the various constitutional conventions Richmond county is an exception to the constitutional provision that senatorial districts must be formed from contiguous territory, the joinder of said county to the county of Queens to constitute the second senatorial district violates the Constitution because the population of Queens county under the census of 1905 being far in excess of the ratio for apportioning senators requires that Queens county should constitute a separate senatorial district.

**6. APPORTIONMENT OF THIRTEENTH SENATORIAL DISTRICT INVALID.** The thirteenth senatorial district laid out in the borough of Manhattan in the city of New York violates the constitutional provision that senatorial districts shall be as compact in form as practicable.

**7. APPORTIONMENT ACT WHOLLY INVALID.** The violation of the constitutional provisions in the formation of the second and thirteenth senatorial districts so affects the entire Apportionment Act (L. 1908, ch. 431) as to render it wholly unconstitutional and void.

**8. VALIDITY OF ACTS OF LEGISLATURE, ELECTED UNDER APPORTIONMENT ACT.** Notwithstanding the invalidity of the Apportionment Act the legislature elected by the people at the last general election is a *de facto* body and its acts are in all respects valid. As a *de facto* body each house has, under the Constitution, not only the exclusive power but the exclusive right to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat, becomes thereby a *de jure* member of that house; so that each member thereof, so long as the particular house to which he has been elected does not oust him, is not only a *de facto* but a *de jure* officer, entitled to all the privileges and emoluments of his office, and his title thereto cannot be challenged before any tribunal except the house itself.

**9. NEXT ELECTION MUST BE HELD UNDER NEW ACT OR UNDER CONSTITUTIONAL APPORTIONMENT OF 1894.** While the courts cannot pass on the title of any present member of the legislature, they can control the action of administrative officers in the conduct of the next election that takes place. If the present legislature should pass a new apportionment act in compliance with the Constitution, the next general election at which members of either house are elected will be held under the new statute. If the legislature fails to discharge this duty then the election must be held in accordance with the apportionment of the Constitution of 1894.

*Matter of Sherrill v. O'Brien*, 114 App. Div. 890, reversed.

*Matter of Pendleton v. O'Brien*, 114 App. Div. 890, reversed.

*Matter of Payne v. O'Brien*, 114 App. Div. 890, reversed.

Argued January 28, 1907; decided April 3, 1907.)

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APPEAL in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 12, 1906, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus directing the secretary of state to transmit to the county clerk of each county, and to the board of elections of the city of New York, election notices as provided by section 5 of the Election Law, and that he embrace in said election notices the number of senators and members of assembly to be voted for at the election to be held on November 6, 1906, required and allowed to be voted for under the apportionment contained in the Constitution of this state, and not according to the apportionment contained in chapter 431 of the Laws of 1906.

An appeal from orders of the same date in each of the above-entitled proceedings was argued in this court on September 28, 1906, and the appeals were dismissed October 1st, 1906. (*Matter of Sherrill v. O'Brien*, 186 N. Y. 1.) The relators thereafter applied to the Appellate Division and obtained a modification of the order *nunc pro tunc* in each of the proceedings so as to read "That the order appealed from be and hereby is affirmed and the writ refused on a question of law only," and from the order as so amended in each case a new appeal has been taken to this court.

By chapter 431 of the Laws of 1906 the legislature divided the state into fifty-one senate districts and also provided the number of assemblymen to be elected in each county. Prior to the passage of that act an enumeration of the inhabitants of the state had been taken as provided by the Constitution of 1894. The following is a statement of the senatorial districts as provided by said act with the name of the county or counties from which each is formed, and the number of inhabitants, excluding aliens therein :

District No. 1.

Suffolk.....	75,634
Nassau.....	61,541
	137,175

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## District No. 2.

Queens.....	179,746	
Richmond.....	66,441	
		246,187

## Districts Nos. 3 to 10.

Kings.....	1,178,782	
Average population to a district.....		147,347

## Districts Nos. 11 to 22.

New York.....	1,800,292	
Average population to a district.....		150,024

## District No. 23.

Westchester.....	202,650	202,650
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## District No. 24.

Orange.....	101,644	
Rockland.....	41,240	
		142,884

## District No. 25.

Columbia.....	41,268	
Dutchess.....	77,864	
Putnam.....	13,083	
		132,215

## District No. 26.

Greene.....	30,317	
Ulster.....	83,302	
		113,619

## District No. 27.

Delaware.....	46,013	
Sullivan.....	33,592	
Chenango.....	36,253	
		115,858

## District No. 28.

Albany.....	163,983	163,983
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## District No. 29.

Rensselaer.....	118,732	118,732
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## District No. 30.

Washington.....	45,560	
Essex.....	31,161	
Clinton.....	45,618	
		122,339

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District No. 31.		
Saratoga.....	60,543	
Schenectady.....	64,817	125,360
District No. 32.		
Warren.....	31,107	
Fulton .....	40,656	
Hamilton.....	4,729	
Montgomery.....	46,650	123,142
District No. 33.		
Herkimer.....	51,040	
Otsego.....	47,664	
Schoharie.....	24,936	123,640
District No. 34.		
St. Lawrence.....	84,866	
Franklin .....	42,930	127,796
District No. 35.		
Jefferson .....	74,680	
Lewis.....	26,016	100,696
District No. 36.		
Oneida.....	181,393	181,393
District No. 37.		
Oswego.....	68,847	
Madison.....	39,052	107,899
District No. 38.		
Onondaga.....	169,732	169,732
District No. 39.		
Cortland.....	28,912	
Broome.....	69,981	
Tioga.....	26,596	125,489

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## District No. 40.

Chemung.....	50,584	
Schnuyler.....	14,921	
Tompkins.....	33,350	
		98,855

## District No. 41.

Cayuga.....	63,018	
Seneca.....	24,751	
Yates.....	19,086	
		106,855

## District No. 42.

Wayne.....	47,022	
Ontario.....	50,695	
		97,717

## District No. 43.

Steuben.....	80,638	
Allegany.....	42,224	
		122,862

## District No. 44.

Genesee.....	34,282	
Wyoming.....	30,775	
Livingston .....	34,943	
		100,000

## Districts No. 45 and 46.

Monroe .....	225,609	
Average population to a district.....		112,804

## District No. 47.

Niagara .....	77,250	
Orleans .....	30,078	
		107,328

## Districts Nos. 48, 49 and 50.

Erie .....	438,577	
Average population to a district .....		146,192

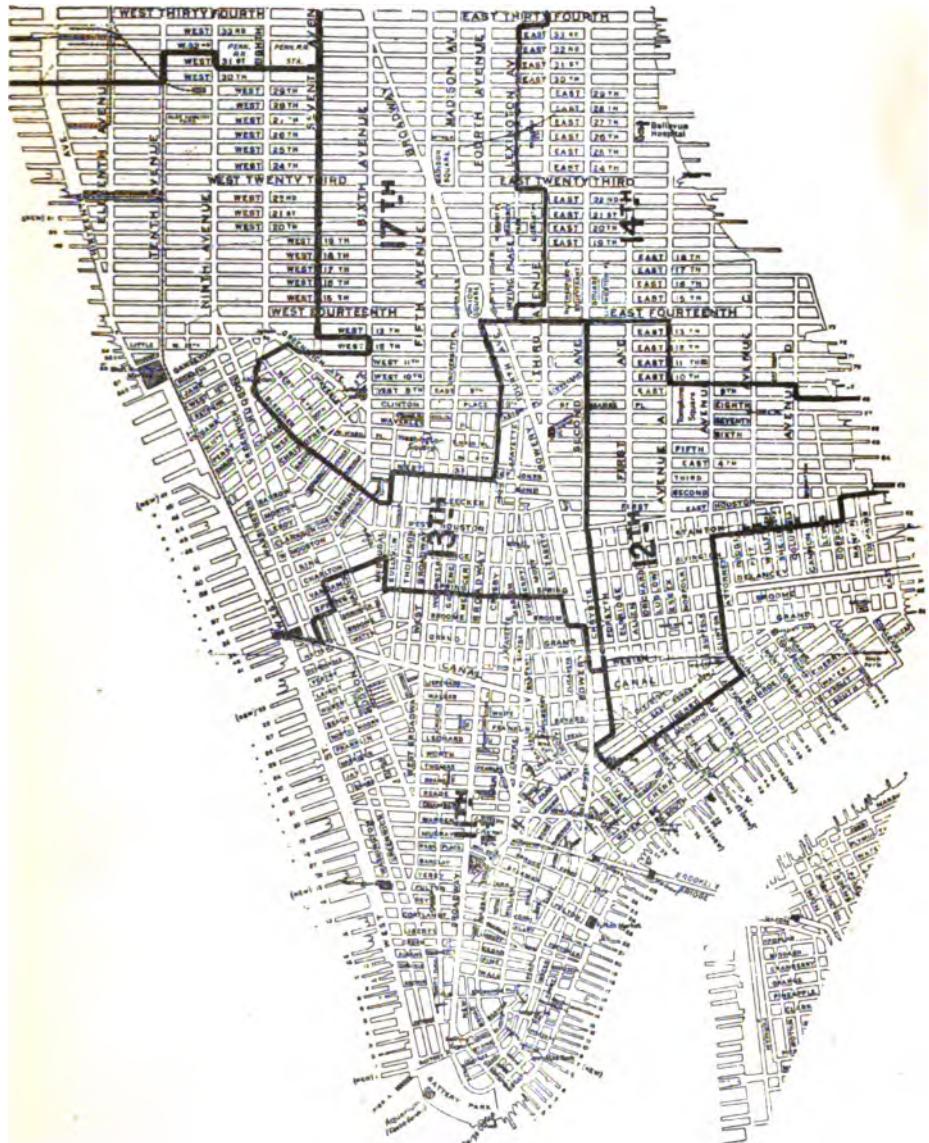
## District No. 51.

Chautauqua .....	91,923	
Cattaraugus .....	63,399	
		155,322

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The following is a diagram of the county of New York showing the island of Manhattan from Thirty-third street southerly, including its division into senate districts:



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Further facts will be found in the opinion.

*Eugene Lamb Richards, Jr., and William Allaire Shortt* for Walter Pendleton, appellant. Counties united in a senate district must be contiguous. (Const. of N. Y. art. 3, § 4; *People ex rel. Carter v. Rice*, 135 N. Y. 473; *People v. Carrick*, 198 Ill. 150; *People v. Thompson*, 155 Ill. 451.) The counties of Queens and Richmond are not contiguous. (*Bent v. Gaenzer*, 17 Misc. Rep. 570; *Houghtaling v. Groesbeck*, 51 N. Y. 673; *Matter of Ward*, 52 N. Y. 397; *Halston Co. v. Campbell*, 89 Va. 396; *Josh v. Josh*, 5 C. B. [N. S.] 465; *Ackers v. U. C. & R. Co.*, 43 N. J. L. 112; *McCullough v. Impt. Co.*, 48 N. J. Eq. 187; *South Orange v. Wittingham*, 58 N. J. L. 655; *State v. Downs*, 59 N. H. 321; *Peverelly v. People*, 3 Park. Cr. Rep. 70; *Yard v. O. B. Assn.*, 42 N. J. Eq. 306.) The court below was in error as to the effect of practical construction on the status of Richmond county. (*Houghtaling v. Groesbeck*, 51 N. Y. 672; *H. S. & P. Co. v. Campbell*, 89 Va. 396; *Supervisors v. Blacker*, 92 Mich. 638; *People v. Albertson*, 55 N. Y. 50; *People v. Allen*, 42 N. Y. 404; *McPherson v. Blacker*, 146 U. S. 1; *Fairbank v. U. S.*, 181 U. S. 308; *Martin v. Hunter*, 1 Wheat. 328; *U. S. v. Dickson*, 15 Pet. 141; *State v. Wrightson*, 56 N. J. L. 208.) The inequality in the attempted re-apportionment is so gross as to constitute an abuse of discretion. (*People ex rel. Carter v. Rice*, 135 N. Y. 473; *Baird v. Bd. of Suprs.*, 138 N. Y. 95.)

*Elon R. Brown* for William L. Sherrill et al., appellants. The Appellate Division in sustaining this apportionment has overlooked the manifest intention of the framers of the Constitution to adopt new and stricter rules for the apportionment of senate districts; to substitute rules for legislative discretion. (Const. of N. Y. art. 3, § 4; Debates of Const. Conv. of 1894, vol. 5, p. 708.) The Supreme Court has express power to review an apportionment act. (Const. of N. Y. art. 3, § 4; *People ex rel. Carter v. Rice*, 135 N. Y. 484.) The

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example of approximate exactness in the numerical apportionment of 1894 by the constitutional convention is proof of the intention of the convention as to the meaning of the rules that should govern future apportionments. (Record of Const. Conv. of 1894, vol. 5, p. 713.) The provisions of the Constitution have been grossly violated in letter and in spirit by the present apportionment. (Const. of N. Y. art. 3, § 4.) The alleged difficulty with Richmond county by reason of the "contiguous clause" is a subterfuge. It has no substance and cannot avail to produce substantial inequality. (Const. of N. Y. art. 3, § 4.) The limitations in senate representation from counties having more than three senators have no application either in word or principle to Queens and Richmond as parts of Greater New York. (Report of Committee on Apportionment, vol. 5, p. 708; Address to the People, vol. 4, p. 1251, sub. 9, p. 1253.) The rule that "counties \* \* \* which from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens," has been repeatedly violated in the apportionment as made. (Const. of N. Y. art. 3, § 4; *People ex rel. Carter v. Rice*, 135 N. Y. 484.) The legislature has violated the requirement of the Constitution as to compactness of senate districts. (Const. of N. Y. art. 3, § 4.)

*Edward B. Whitney* and *Robert Grier Monroe* for George E. Payne et al., appellants. The apportionment is void on account of its violation of the rights of Queens county. (Const. of N. Y. art. 3, § 4; 1 Story on Const. 407; Cooley's Const. Lim. [7th ed.] 603-606; *Fairbank v. U. S.*, 181 U. S. 283; *People v. Allen*, 42 N. Y. 378.) The constitutional requirement of compactness has been repeatedly violated by flagrant gerrymanders. (Const. of N. Y. art. 3, § 4.)

*Julius M. Mayer*, *James G. Graham* and *Merton E. Lewis* for apportionment. The constitutional requirements have been complied with. (*Smith v. Supra.*, 148 N. Y. 187; *People v. Thompson*, 155 Ill. 451; *People v. Carlock*, 198

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Ill. 150.) The constitutional provision as to equality in number of inhabitants is not violated by chapter 431 of the Laws of 1906. (*I. & S. L. R. R. Co. v. Horst*, 3 Otto, 300; *E. S. M. Co. v. Park*, 14 Blatchf. 414; *Beardsley v. Littell*, 14 Blatchf. 105; *Reed v. Smith*, 42 Col. 251; *Prouty v. Storm*, 11 Kans. 261; *People v. Carlock*, 198 Ill. 150; *People v. Thompson*, 155 Ill. 451; *Giddings v. Blacker*, 92 Mich. 1; *Houghton County v. Blacker*, 92 Mich. 638; *People v. Broome*, 20 N. Y. Supp. 470.) The constitutional provision as to compactness is not violated. (*People v. Thompson*, 155 Ill. 451; *Matter of Baird*, 142 N. Y. 523; *People v. Gaiter*, 149 Ill. 39.) The constitutional provision that the district shall at all times consist of contiguous territory has been observed. (*People ex rel. Williams v. Dayton*, 55 N. Y. 378; *People ex rel. Joyce v. Brundage*, 78 N. Y. 403; *Houghton County v. Blacker*, 92 Mich. 638.) Unless the statute is unconstitutional beyond any doubt, it is the duty of the court to declare it constitutional. (*Parker v. State*, 133 Ind. 178; *State v. Campbell*, 48 Ohio St. 435; *People ex rel. Kemmler v. Durston*, 119 N. Y. 169; *People ex rel. Carter v. Rice*, 135 N. Y. 473; *Rose v. Goddard*, 52 Barb. 533; *Ford v. Cummings*, 90 Hun, 481; *McGrath v. Grout*, 69 App. Div. 315; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1; *Matter of N. Y. & L. I. B. Co.*, 148 N. Y. 551.)

William S. Jackson, Attorney-General (George P. Decker of counsel), for respondent. If the apportionment attacked is not in accord with the requirements of the Constitution, there are no consequences which should deter this court from holding it invalid, since the legislators, elected in the year 1906, would remain *de facto* officers. (*People v. Rumsey*, 19 N. Y. 41; *Houghton County v. Blacker*, 92 Mich. 638; *Giddings v. Blacker*, 92 Mich. 1; *State v. Cunningham*, 81 Wis. 440.) If this court should conclude and declare the apportionment of 1906 unconstitutional, it would still be competent for the legislature to make another, and its power and duty so to do would continue until performed. (*People ex rel. Carter v.*

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*Rice*, 135 N. Y. 473.) An obligation rests upon this court to pass upon the merits of the controversy. (Const. of N. Y. art. 3, § 5.)

CHASE, J. The validity of the so-called Apportionment Act of 1906 is assailed, and it is claimed that some of its provisions relating to the division of the state into senatorial districts are contrary to express constitutional provision, and that other provisions thereof constitute such an arbitrary use of alleged discretionary power as to be wholly invalid and void. The power of this court to review the questions involved in the relator's claim should be first considered.

In the United States the general power and authority of the judicial department of the Federal and of the State governments to determine the constitutional validity of legislative acts applicable to and involved in a pending controversy is not now open to question. It is also expressly provided by section 5 of article 3 of our State Constitution of 1894 that an apportionment by the Legislature or other body "Shall be subject to review by the Supreme Court, at the suit of any citizen, under such reasonable regulations as the Legislature may prescribe; and any court before which a cause may be pending involving an apportionment shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same."

This constitutional provision is new, and it was intended to and does set at rest any further claim that the legislature in passing an act reapportioning the state for legislative purposes is so far exercising a political, as distinguished from a legislative power, that its action cannot be reviewed by the courts. The jurisdiction of the Supreme Court of this state to *review* an apportionment by the legislature or other body is now express, but the jurisdiction to review such an act of apportionment is not expressly given by Constitution to this court. The jurisdiction of this court to review the orders appealed from is the general jurisdiction of the court to review actual determinations made by the Appellate Division of the Supreme Court of

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orders finally determining special proceedings (Constitution, art. 6, sec. 9; Code Civ. Pro. sec. 190) and the jurisdiction of the court is limited to the review of questions of law. (Constitution, art. 6, sec. 9; Code Civ. Pro. sec. 191, sub. 3.) The determination of every question of law involved in the appeals is within the jurisdiction of this court.

In the opinion of Judge ANDREWS in *People ex rel. Carter v. Rice* (135 N. Y. 473, 521), referring to the jurisdiction of this court in determining the constitutionality of the Apportionment Act of 1892 (Laws of 1892, chap. 397) he said: "I shall not undertake to show that the question presented is of judicial cognizance. That it is a judicial question cannot under the authorities be denied. The legislature and the courts are alike bound to obey the Constitution, and if the legislature transgresses the fundamental law and oversteps in legislation the barriers of the Constitution, it is a part of the liberties of the people that the judicial department shall have and exercise the power of protecting the Constitution itself against infringement. The power of the courts to set aside an unconstitutional apportionment has quite recently been asserted and exercised by the courts of Wisconsin and Michigan. (*State ex rel. Raymer v. Cunningham*, 51 N. W. Rep. 1133; *Giddings v. Blacker*, 52 id. 944; *Supervisors of Houghton County v. Blacker, Secretary of State*, id. 951.)"

Although the language quoted is taken from a dissenting opinion, the opinion of the court by Judge PECKHAM does not deny the power of the court to review an act of apportionment, but it says (page 501): "We think that the courts have no power in such case to review the exercise of a discretion entrusted to the legislature by the Constitution unless it is plainly and grossly abused. \* \* \* We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of and an intentional disregard of its commands both in the letter and in the spirit had been indulged in."

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And Judge GRAY in his concurring opinion in the same case (page 510) says: "But if any provision of the fundamental law of the state intended to secure the equal representation of its citizens in the legislative department has been violated by the act in question, it is then properly the duty of the judicial department of power to declare it unconstitutional and, therefore, void. The judiciary has a duty to pronounce all legislative acts null which are contrary to the manifest tenor of the Constitution of the state."

The jurisdiction of this court was again considered in *Matter of the Application of Baird v. Board of Supervisors of the County of Kings* (138 N. Y. 95), which involved the division of the county of Kings into assembly districts as provided by said chapter 397 of the Laws of 1892, and this court held that the division that had been made was not a constitutional division, and the court, among other things, said: "The proper discharge of the duty of division by the board implies considerable discretion in the formation of the various districts. The discretion exercised must be an honest and a fair discretion arising out of the circumstances of the case and reasonably affecting the exercise of the power of equal division."

Since the Constitution of 1894 the case of *Matter of Smith v. Board of Supervisors, St. Lawrence Co.* (148 N. Y. 187) has been before this court, and it was said that "Each case must be decided on its peculiar facts, and the courts can be relied upon at all times to enforce the Constitution in its letter and spirit."

The courts have jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the Constitution, and if such conflict is found to exist, to declare the act void. (American & English Ency. of Law [2nd ed.], vol. 2, page 485 and cases cited.) It appears, therefore, that the courts can review legislative action in reapportioning the state and that on an appeal to this court jurisdiction should be entertained.

1. Where the question to be determined on the appeal is as

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to whether the legislature has obeyed a mandatory provision of the Constitution, in which case a question of law is presented for the determination of this court.

2. Where by the Constitution some discretion is vested in the legislature this court cannot inquire into the motives of the legislators in exercising such discretion and voting for a particular plan of apportionment and it cannot inquire into the relative merits of several plans to choose from which requires the exercise of sound judgment and judicial discretion. But if the legislature under the assumption of an exercise of discretion does a thing which is a mere assumption of arbitrary power, and which, in view of the provisions of the Constitution, is beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein, such act is not the exercise of discretion but a reckless disregard of that discretion which is intended by the Constitution. Such an exercise of arbitrary power is not by authority of the People. It is an assumption, and when it is claimed that an act is thus in violation of the Constitution a question of law is presented for the determination of this court.

A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have been disregarded any more than an order of the Appellate Division can create a question of fact by declaring that there is one when no question of fact exists. (See *Matter of Totten*, 179 N. Y. 112, and *Penryhn Slate Co. v. Granville Elec. Light & Power Co.*, 181 N. Y. 80.) Any other determination by the courts might result in the constitutional standards being broken down and wholly disregarded.

We have seen that an apportionment may be such as to require that the act be declared invalid and void as a matter of law. Let us look then to the authority of the legislature.

The People are vested with the supreme and sovereign authority. The Constitution is the voice of the People speak-

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ing in their sovereign capacity. (*Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 327, 342.)

An act of the legislature is the voice of the People speaking through their representatives. The authority of the representatives in the legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution.

By our first Constitution, adopted April 20, 1777, it is provided "That the supreme legislative power within this state, shall be vested in two separate and distinct bodies of men ; the one to be called the Assembly of the state of New York ; and the other to be called the Senate of the state of New York ; who, together, shall form the legislature, \* \* \*." (Section 2.)

Our Constitution, adopted November 6, 1894, provides that "The legislative power of this State shall be vested in the Senate and Assembly." (Article III, section 1.) The general legislative power is absolute and unlimited except as restrained by Constitution, (*Bank of Chenango v. Brown*, 26 N. Y. 467; *People ex rel. McLean v. Flagg*, 46 N. Y. 401.) It will be observed, however, that no general power is by the Constitution vested in the legislature, to change or modify the number of its members or the districts from which they are to be elected. The Constitution has always included special provisions relating thereto and such special provisions constitute the full authority of the legislature. It is the authority of the legislature over itself that we must examine and study to aid in determining the questions before us.

By the Constitution of 1777 it was provided that the senate should consist of twenty-four freeholders. Section 12 provided "That the election of senators shall be after this manner : That so much of this state as is now parcelled into counties, be divided into four great districts : the southern district to comprehend \* \* \*. That the senators shall be elected by the freeholders of the said districts, qualified as aforesaid, in the proportions following, to wit : In the southern district, nine. \* \* \* And be it ordained, that a census shall be taken as soon as may be after the expiration of seven years from the termination of the present war, under the direc-

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tion of the legislature; and if, on such census, it shall appear that the number of senators is not justly proportioned to the several districts, that the legislature adjust the proportion, as near as may be, to the number of freeholders, qualified as aforesaid, in each district. \* \* \* And be it ordained, that it shall be in the power of the future legislatures of this state, for the convenience and advantage of the good people thereof, to divide the same into such further and other counties and districts, as shall to them appear necessary."

In the section of the Constitution (Section 5) relating to assemblymen, after providing for the census, it further provides: "And if on such census it shall appear, that the number of representatives in assembly from the said counties is not justly proportioned to the number of electors in the said counties respectively, that the legislature do adjust and apportion the same by that rule."

The constitutional amendments of 1801 retained directions that senators and assemblymen should be apportioned "As nearly as may be according to the number of electors," but no further general limitations were placed upon the legislative power of apportionment.

By the Constitution of 1821 the state was divided into eight senate districts. It was therein further provided (Article I, section 6) that "An enumeration of the inhabitants of the state, shall be taken, under the direction of the legislature, in the year one thousand eight hundred and twenty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the legislature, at the first session after the return of every enumeration, that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, paupers and persons of colour not taxed; and shall remain unaltered, until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district."

By the Constitution of 1846 the state was divided into thirty-two senate districts to correspond with the number of

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senators to be elected. And it was therein further provided (Art. 3, sec. 4) that "An enumeration of the inhabitants of the state shall be taken, under the direction of the legislature, in the year one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and the said districts shall be so altered by the legislature, at the first session after the return of every enumeration, that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens, and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators."

The Constitution adopted November 6, 1894, divided the state into fifty districts and it further provided by article 3, section 4, as follows:

"An enumeration of the inhabitants of the State shall be taken under the direction of the Secretary of State during the months of May and June, in the year one thousand nine hundred and five, and in the same months every tenth year thereafter; and the said districts shall be so altered by the Legislature at the first regular session after the return of every enumeration, that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the return of another enumeration, and shall at all times, consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to

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make said districts most nearly equal in number of inhabitants, excluding aliens.

"No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators. \* \* \*."

In a true representative government every person should be equally represented in its legislative bodies. Exact representation requires that every senator and every assemblyman shall represent the same number of people. The maintenance of county, town and block lines and other practical considerations, recognized by and provided for in the Constitution, makes mathematical exactness in the division of the state into senate and assembly districts impossible. Because of the necessity of slight variations in the number of inhabitants in districts formed in accordance with the directions of the Constitution, it has always provided in substance for a division as nearly as may be in accordance with the number of inhabitants. The quotations that we have made from our first Constitution, and from the subsequent amendments thereto and changes therein, show that equal representation in proportion to population has been the cardinal and underlying principle to which it has always pointed in directing and authorizing the legislature to reapportion the state.

The direction to the legislature that the senators be apportioned "as near as may be to the number of freeholders" is the only limitation on the power of apportionment contained in the first Constitution and the amendment of 1801. The very purpose of a decennial census provided for in the several Constitutions of the state has been to adjust differences in population which arise from changes in places of abode or increase in the number of inhabitants, and thus from time to time to make representation in the legislature more nearly ideal.

By the second Constitution of 1821 a new limitation was

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placed upon the power of the legislature in the matter of apportionment by which it is provided that senatorial districts "shall at all times consist of contiguous territory." Substantially the same limitations were included in the third Constitution of 1846. Prior to the constitutional convention of 1894 much controversy had arisen in the state about the possibility of unfair divisions of the state into senate and assembly districts, so as to result in party or individual advantage. The apportionment of 1879 (Laws of 1879, chap. 208) was criticized; the enumeration of the inhabitants provided for in 1885 was delayed; and the apportionment of the state in 1892 (Laws of 1892, chapter 397), which was carried by vote of a majority of the legislature representing a different political party than the majority in 1879, was also criticized, and the act was challenged in the courts as not being in accordance with the letter and spirit of the Constitution. At least three proceedings were commenced which had for their purpose a judicial determination of the constitutionality of the act of 1892. The decisions in the General Term of the Supreme Court in such proceedings were conflicting. From orders in each of the proceedings an appeal was taken to this court and the decisions are reported under the title of *People ex rel. Carter v. Rice* (*supra*), in which case the question before the court was summed up in the prevailing opinion in these words, "The sole question now is whether the legislative discretion has been so far abused as to render the act liable to an overthrow by the courts." The conclusion of a majority of the court was that the "Act of 1892 successfully withstands all assaults upon it and is a valid and effective law." A dissenting opinion by Judge ANDREWS was concurred in by Judge FINCH. Thereafter and before the constitutional convention of 1894 another proceeding came before this court (*Matter of Baird v. Supervisors, supra*) and it was held that the division of the county of Kings into assembly districts had been made in disregard of the principles of equal representation and contrary to the Constitution. The decision in the *Baird* case was an exercise of jurisdiction by

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this court and a determination that the constitutional provisions in regard to equality of representation had been disobeyed, although section 5 of article 3 of the Constitution at that time, as amended by a vote of the people November 3, 1874, provided for a division of the "respective counties into assembly districts each of which districts shall consist of convenient and contiguous territory."

In Lincoln's Constitutional History of New York (Volume 3, page 135) he calls attention to the opening address of the president of the convention, and commenting thereon he says: "The subject was doubtless given this precedence both on account of its intrinsic importance and also because of the unsatisfactory results of the apportionment of 1892 and the evident necessity of formulating rules which would prevent a repetition of inequitable apportionments and insure proportionate representation of population according to strict mathematical computation so far as consistent with other rules of limitation based on specified territorial divisions."

Referring again to the apportionment of 1892 he says (page 203): "Like many other events which have been noticed in these studies, it was a history-making statute and was the immediate occasion of important constitutional changes."

Again he says (page 218): "The apportionment of 1892 was frequently referred to in the course of the debate. Its inequalities and the possibilities under the existing Constitution, as shown by a decision in the *Carter Case* (135 N. Y. 473), were considered a sufficient reason for including in the Constitution rules which would make impossible a repetition of that statute."

These statements are fully justified by a perusal of the proceedings of the convention relating to the subject of apportionment, to which proceedings we can look when judicially construing the Constitution. (*People ex rel. Henderson v. Supervisors of Westchester Co.*, 147 N. Y. 1; *Matter of Keymer*, 148 N. Y. 219.)

This court, in *Matter of Smith v. Board of Supervisors, St. Lawrence Co.* (148 N. Y. 187), said: "The evil sought to be

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remedied by the new Constitution was to prevent those gross discrepancies in apportionment and representation that had long been a public scandal and a reproach to the good name of the state." With that end in view, the Constitution of 1894 includes the following mandatory provisions in regard to senate districts :

1. Shall at all times consist of contiguous territory.
2. No county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county.
3. No town and no block in a city inclosed by streets or public ways shall be divided in the formation of senate districts.
4. Nor shall any district contain a greater excess in population over an adjoining district in the same county than the population of a town or block therein adjoining such district.
5. No county shall have four or more senators unless it shall have full ratio for each senator.
6. No county shall have more than one-third of all the senators.
7. No two counties or the territory thereof as now organized, which are adjoining counties or which are separated only by public waters, shall have more than one-half of all the senators.

In addition to these mandatory provisions it directs :

1. Each senate district shall contain, as nearly as may be, an *equal number* of inhabitants, excluding aliens.
2. Be in as compact form as practicable.
3. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. (*Matter of Smith v. Board of Supervisors, St. Lawrence Co.*, 148 N. Y. 187, 193.)

In view of these limitations this court, in *In re Smith v. Board of Supervisors* (*supra*), said : "We feel assured that the People of the state can never again be subjected to those inequalities of apportionment and representation which gave rise to some of the present constitutional provisions so long as

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the maximum excess in the population of the district is limited by mandatory provision to the population of a town adjoining such assembly district and the discretion exercised within that narrow limit is subject to the supervision of the courts." These words were used with reference to a division of counties into assembly districts.

Can it be doubted that in view of the history of constitutional changes in regard to legislative apportionment which shows a gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon their power relating thereto, and in view of the clear intention of the constitutional convention of 1894 and of the People in adopting the Constitution that this court should now hold that the minimum of discretion necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the Constitution, is left to the legislature?

As the discretion of the legislature relating to the relative number of inhabitants in senate districts arises from necessity it should cease where the necessity for discretion ends. In the section of the Constitution relating to assemblymen (Article 3, section 5) it is provided that in any county entitled to more than one member of assembly the board of supervisors and in any city embracing an entire county and having no board of supervisors, the common council, shall "Divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of *convenient* and contiguous territory in as compact form as practicable."

The word "convenient" is omitted in directing the legislature in regard to a division of the state into senate districts. We must assume that it was intentionally omitted. (*Roosevelt v. Godard*, 52 Barb. 533.)

Every provision of the Constitution which allows any discretion by the legislature in apportionment must to some extent be affected and controlled by every other provision of the Constitution, but in the division of the state into senate districts matters of mere convenience and individual taste are not subjects for consideration.

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While we recognize the binding force of the *Carter* case as applied to the facts then before the court, and in the construction of the Constitution as it then existed, we are of the opinion that the Constitution as it now exists should be construed so as to require that the legislature in dividing the state into senate districts make as close an approximation to exactness in number of inhabitants as reasonably possible in view of the other constitutional provisions, and that such approximation is the limit of legislative discretion.

In construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning. The ordinary and plain meaning of the words "contiguous territory" is not territory near by, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other territory.

Richmond county is not contiguous to Queens county within the meaning of contiguous as thus defined. Although Richmond county by its statutory boundaries adjoins the county of Kings, the latter county by its statutory boundaries intervenes between the county of Richmond and the county of Queens. Richmond county, never having had a population sufficient to entitle it to a senator, has by reason of its insular situation been peculiarly situated. The People, by Constitution and by acts of the legislature, have treated it as an exception to the mandatory provision of the Constitution in regard to contiguity, and because it has been necessary it has been joined in senate districts with counties whose actual and statutory boundaries do not touch or adjoin it.

The mandatory provision in regard to contiguity of territory comprising a senate district has been in the Constitution since 1821. By the Constitution of 1846 the county of Richmond was joined with the counties of Suffolk and Queens to constitute the first senate district. By chapter 339 of the Laws of 1857, by which the senate districts of the state were changed by the legislature, said counties were joined to con-

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stitute the first senate district. By chapter 805 of the Laws of 1866 the legislature again joined these counties to make the first senate district. Although in 1879 Richmond county was joined with a part of the county of New York and in 1892 with a part of the county of Kings, the Constitution of 1894 joined the counties of Richmond and Suffolk to make the first senate district. By reason of a new constitutional provision the county of Richmond cannot now be joined to a part of either New York or Kings counties to make a senate district. In view of the construction placed on the Constitution by constitutional and legislative provisions, it should be held that the county of Richmond is exempt from the constitutional provision requiring that senate districts be composed of contiguous territory. The exception, however, should not be made more general than is required from the constitutional and legislative precedents. It nowhere appears by the Constitution of 1846 or 1894 that it was intended that the county of Richmond should be so generally exempt from its provision in regard to contiguity of territory that it could be by statute joined with any of the other counties of the state to make a senate district. The absurdity of joining Richmond county with some of the interior counties of the state to make a senate district is apparent upon a mere suggestion of such possibility. It should not be joined with a county other than one like itself bounded on the Atlantic ocean or with a county bounded on the Hudson river which is sufficiently near to Richmond county so that a senate district so formed would be as far as possible within the letter and spirit of the constitutional provision requiring that senate districts shall "be in as compact form as practicable."

We do not think that the legislature violated the mandatory provision of the Constitution relating to contiguity of territory by joining the county of Richmond with the county of Queens.

The citizen population of the state as shown by the enumeration of 1905 was 7,062,988. Dividing this number by 50, as provided by the Constitution, gives a ratio of 141,259

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for apportioning senators. With such ratio it appears that the county of New York was entitled to 12 senators; the county of Kings to 8, and the county of Erie to 3, in which counties the average citizen population to a district would be respectively 150,024, 147,347 and 146,192, and the county of Kings was entitled to one senator more than the number specifically provided therefor by the Constitution as adopted in 1894, and under the new constitutional provision it increased the full number of senators in the state from 50 to 51. Deducting from the entire citizen population of the state the citizen population of the counties of New York, Kings and Erie, there remains a citizen population in the other counties of the state of 3,645,337, which divided by 28, the number of senators outside of the counties of New York, Kings and Erie, gives a ratio for each senatorial district of 130,190. The counties other than New York, Kings and Erie having a citizen population in excess of the ratio for apportioning senators are Queens, Westchester, Albany, Rensselaer, Oneida, Onondaga and Monroe. Each of these counties having a citizen population in excess of the ratio is entitled by any just and reasonable construction of the Constitution to at least one senator. (*State ex rel. Atty.-Gen. v. Cunningham*, 81 Wis. 440; *Parker v. State*, 133 Ind. 178.)

The minimum rights of such counties were determined by the enumeration and they could not be taken away by an exercise of discretion by the legislature at least unless the geographical position of some small county was such as to make it absolutely necessary that it be joined with some one of such counties. No such absolute necessity required that Richmond county be joined to Queens county or to any other county having its full ratio. Joining Richmond county to Queens county to make the second senatorial district was an exercise by the legislature of arbitrary power not authorized by the Constitution. If Richmond county should be joined to Nassau county it would not make a citizen popula-

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tion equal to the ratio, and even if the peculiar position of those island counties would allow the legislature in its discretion to join the counties of Richmond, Nassau and Suffolk in one senate district the combined citizen population of such counties would be but 203,616. The relative citizen population of the first and second senate districts as provided by the act is 137,175 to 246,187, and between the first and second districts, if the first was composed of the three counties stated and the second of Queens county alone, would be 203,616 to 179,746 or a difference in favor of equality between the first and second senatorial districts of 85,142. The rights of Queens county under the Constitution because of its having a citizen population above the ratio and also by reason of inequalities in the number of citizens in the first and second senate districts required that Queens county be given a senator without joining with it any other county.

A reference to the diagram will show how grossly the provision of the Constitution in regard to compactness has been violated in the thirteenth senatorial district which is within the county of New York. All of the territory of the county of New York comprising that portion of Manhattan island shown on the diagram is comparatively level and fully covered by blocks bounded by streets on which blocks buildings have been erected for business or residential purposes, and no possible purpose for the exercise of discretion to make a district that is not reasonably compact has been shown, and no effort whatever seems to have been made to make the district mentioned in as compact form as practicable.

The reasons alleged for the rambling territory comprising the thirteenth senate district with its boundaries of many sides and various angles are wholly immaterial and not recognized by the Constitution in the apportionment of senate districts. A reference to the boundaries of the senate districts in said county as made by the constitutional convention shows that the county can be divided into districts which are reasonably compact, each having comparatively few sides and angles. Within the limits of a city entitled to many senators the

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requirements for compactness would seem to exclude all possibility of a district in the shape of the thirteenth senatorial district as shown on the diagram. (*In re Timmerman*, 100 N. Y. Supp. 57.)

The disregard of constitutional provisions in forming the second and thirteenth senate districts is clear, and they so affect the entire apportionment as to make it necessary to declare the act wholly unconstitutional and void. It is not necessary or wise to discuss the provisions of the act relating to other senate districts except to say that differences arising from necessity and slight differences in the citizen population of senate districts and the relative weight of slight differences in population in comparison with considerations of compactness or the reverse, upon which men of judgment and discretion may fairly differ, are matters belonging distinctly to the legislature and not to the judicial branch of the government, and with which this court has no disposition or jurisdiction to interfere.

Every apportionment must stand upon its own particular facts. The rules and principles which we have stated are general, and result from an examination of the Constitution and a study of its development. They are applied to the facts on this appeal so far as stated and only so far as stated.

It is difficult and perhaps impossible to state rules by which future apportionments can be measured. This court has already said by PECKHAM, J., in *Matter of Baird v. Supervisors (supra)*, that "We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of evening and the darkness of advancing night is not so easily drawn." (See *People ex rel. Schau v. Mc Williams*, 185 N. Y. 92, 100.)

I concur in the views expressed by CULLEN, Ch. J., as to the effect of the acts of a *de facto* legislature so long as its members remain actual incumbents of their offices respectively.

The orders should be reversed, with costs to appellants in all courts, but as since the institution of the proceedings the several respondents have gone out of office and the election

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itself has been held, no order should be made directing the issue of a writ of mandamus.

CULLEN, Ch. J. In reaching the conclusion which we have announced in the opinion of Judge CHASE, we have not by any means failed to fully weigh and consider the results that may follow from our decision. While our supreme duty is to enforce the provisions of the Constitution, upon which, as a foundation, the whole fabric of the government of this state rests, we fully appreciate that government is or should be pre-eminently a practical thing and that courts should long hesitate to throw the government into confusion and disorder by declaring an act of the legislature invalid, and so declare only when the violation of the constitutional mandate is clear and certain. That the violation of the Constitution is too plain to be disregarded is the conclusion to which we have been forced by the reasons stated by my brother CHASE; but at the same time we think it not only proper but our duty to say that in our opinion the fear that our decision may throw the government of the state into confusion is unfounded. When this appeal was before us immediately prior to the general election last year, in dismissing that appeal we unanimously said that whether the Apportionment Act of 1906 was constitutional or not, the legislature which might be actually chosen by the electors of the state under that apportionment would be a *de facto* legislature, whose acts would, in all respects, be binding. To that declaration we still adhere, and we understand no one to gainsay it. It is now, however, suggested that when our decision that the Apportionment Act is unconstitutional is announced, from that time the present legislature will no longer be a *de facto* body. This suggestion is without force either in principle or under the authorities. An act of the legislature if invalid, as violating the Constitution, is invalid from the time of its enactment, not merely from the declaration of its character by the courts. But though the appointment or election of a public officer may be illegal, it is elementary law that his official acts

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while he is an actual incumbent of the office are valid and binding on the public and on third parties. (2 Kent's Comm. 295; *People ex rel. Bush v. Collins*, 7 Johns. 549; *Wilcox v. Smith*, 5 Wend. 281; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1; *State v. Carroll*, 38 Conn. 449.) In the case last cited there is one of the best expositions of the doctrine of *de facto* officers to be found in the reports. The doctrine is not one of convenience merely but of necessity. In *State ex rel. Knowlton v. Williams* (5 Wis. 308) it was contended that a statute of the state was invalid because approved by a governor whom the courts subsequently declared not to be entitled to the office. Nevertheless, it was held that as the statute was approved by an actual incumbent of the office of governor, it was in all respects valid and effective. Of course, an officer who, though *de facto*, is not such *de jure*, may be ousted from the office he illegally holds by proceedings instituted to try his title to the office, and when adjudged a usurper he ceases from that time to be an officer *de facto*. But to have this effect the judgment must be rendered in a proceeding to oust him from office; it is not sufficient for the purpose that his title to office be declared bad in a collateral proceeding. A notable example of this principle is the case of *People ex rel. Smith v. Schiellein* (95 N. Y. 124), which was an application for mandamus against the town board of New Lots to canvass the vote and award a certificate to the relator, who claimed to have been elected a justice of the peace at the town meeting. The right of the relator depended on his claim that a statute directing justices of the peace of the town of New Lots to be chosen at the general election was unconstitutional and void, and so the courts held. It happened, however, that one of the defendants in the proceeding was a justice of the peace elected and holding office under the very statute declared invalid. He insisted that if the statute was invalid he was not a justice of the peace nor a member of the town board, and, therefore, the writ should not run against him. This court overruled the objection, saying it was sufficient that Watson, the defendant, who raised the objection, was actually

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in office, and it also said that the decision in the mandamus suit of itself did not oust him. Judge RUGER wrote for the court: "It may be that one of the results following the determination of this appeal will be his removal from office, but that will not be the direct result of our adjudication. Title to his office is not triable in this proceeding and, therefore, cannot be here adjudicated." It was, therefore, entirely possible that had no proceedings been taken against Watson, or had he not voluntarily relinquished office, he might have remained therein despite the adverse decision of the court, and his acts would have been valid. The position of the members of the present legislature is much stronger. The proceeding before us is not to try the title of any member of the legislature to his office, but against certain administrative officers as to the conduct of an election. Therefore, were it possible for the courts to try the title of members of the legislature this decision would not directly affect that title. But, under the Constitution, each house of the legislature is the exclusive judge of the election and qualification of members. The courts have no jurisdiction to determine the title of any member. In the case of *People ex rel. Sherwood v. State Board of Canvassers* (129 N. Y. 360) by a divided court it was held that the relator being disqualified under the Constitution from election as a senator the courts would not compel a board of canvassers to give a certificate of his election, but even the majority opinion conceded that the ruling of the court would in no way bind the senate, when convened, on the question of the relator's rights. As already said, the senate and assembly elected under the Apportionment Act and actually assembled constitute in any aspect a *de facto* legislature. As a *de facto* body each house has, under the Constitution, not only the exclusive power but the exclusive right to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat becomes thereby a *de jure* member of that house, even though the courts, were such a question triable before them, might be of a different opinion.

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It follows, therefore, that not only is the present legislature a valid legislature, but that each member thereof, so long as the particular house to which he belongs does not oust him, is as to all the world not only a *de facto* but a *de jure* member, and is entitled to all the privileges of a member, the exemption of his person, the right to his salary and the like, and his title to office cannot be challenged before any tribunal except the house itself. Thus there can be no vacancy in any particular district which the governor or other officer can call upon the electors to fill, unless the house ousts the member and declares him not entitled to his seat. All this, however, does not show that our decision is a mere *brutum fulmen* and of no practical effect. While the court cannot pass on the title of any present member of the legislature, it can control the action of administrative officers in the conduct of the next election that takes place. If the present legislature should pass a new apportionment bill in compliance with the provisions of the Constitution, the next general election at which members of either house are to be elected will be held under the new statute. If the legislature fails to discharge this duty, then the election must be held in accordance with the apportionment under the Constitution of 1895. In other words, while the courts cannot interfere with the present legislature, they can compel future elections to be held in compliance with the Constitution.

GRAY, J. I should hesitate to agree with the opinion of my brother CHASE, as to the unconstitutionality of the Apportionment Act, if I were not convinced that the amendment of the State Constitution, in 1894, had materially changed the rules, which should govern the apportionment by the legislature of the representatives of the citizens of the State.

In the case of *People ex rel. Carter v. Rice*, (135 N. Y. 473), which involved the Apportionment Act of 1892 and in the decision of which I took part, I was of the opinion that the then existing constitutional provision vested a certain discretion in the legislative body in exercising its power, with

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which the court should not interfere; when there had been neither a flagrant disregard, nor an unmistakable violation, of the constitutional injunction that the apportionment should be "as nearly as may be" according to the number of citizens.

As may be discovered from the debates in the constitutional convention of 1894, the decision in the *Rice* case moved that body to recommend new provisions, or rules, for an apportionment. They were intended to remedy whatever defectiveness in the old rules made possible the inequalities, observed in the preceding apportionment act.

It is of great significance and it, necessarily, has a most important bearing upon the attitude of the court towards the legislative action, that the article of the Constitution, (Art. III, sec. 5), expressly provides for a judicial review of any apportionment by the legislature. The legislature, now, exercises its power subject to a review by the court of its act, which any citizen may invoke. The article, in its present form, as Judge CHASE well points out, reduces the discretionary power of the legislature to a minimum. The limitations upon its exercise are relaxed, practically, only with respect to the preservation of county, town and block lines. It is the intention of the People of the State, as declared by the recent amendment of the article of the Constitution, that, in the apportionment of districts, there shall be as near to an exact equality in the number of inhabitants, as is possible from a consideration of nothing else than the constitutional provisions upon the subject; that the districts shall consist of contiguous territory; that they shall be in as compact form as possible and that divisions of counties, towns or blocks shall only be made in the cases specified. It was to insure that such an apportionment should be governed by no considerations of convenience, nor rest in a large political discretion, that a review by the court was expressly provided for. That has been made mandatory, which before was discretionary. In my opinion, before this amendment of the Constitution, it was a grave and a doubtful question whether, in the absence of a gross and plain violation of the Constitution, the court was justified in interfering with

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the execution by the legislative department of the government of its duty of apportionment. But, by the amendment, the matter is placed upon a different basis and the duty is devolved upon the court to review an apportionment, when complained of, and, thereby, to enforce the constitutional mandates as they are expressed.

For these reasons, I shall concur with Judge CHASE's opinion that this Apportionment Act is violative of the constitutional provisions.

I am, also, in agreement with the Chief Judge that no serious, or real, embarrassment can arise with respect to governmental, or legislative, acts. However the lay mind may apprehend confusion as the result of our decision, the legal situation, in my opinion, is clear and is correctly stated by Judge CULLEN.

HAIGHT, J. (dissenting). While it has been held that the courts have the power to review the acts of the legislature in apportioning senatorial districts for the purpose of determining whether such acts are in compliance with the requirements of the Constitution, it has been the subject of considerable discussion as to how, or when, the question can be raised, and as to the extent of the power that should be exercised by the court in such review. It was, doubtless, because of such discussion and uncertainty that a new provision was inserted in the Constitution of 1894, which provides as follows: "An apportionment by the legislature, or other body, shall be subject to review by the Supreme Court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same." (Art. 3, § 5.) Unfortunately, the legislature has not, as yet, adopted any regulations or prescribed the practice that should be followed in such a review. I, however, am of the opinion that the provision is self-executing, and, in the absence

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of legislation providing a practice to be followed, the courts will adopt such practice as will secure to all parties their rights to the review provided for. It will be observed that the door has been thrown wide open, and any citizen of the state is given the right to have a review. It is "at the suit of any citizen." The word "suit," as defined by Bouvier, is of comprehensive signification, and applies to any proceeding in a court of justice in which a person pursues a remedy which the law affords him for the redress of an injury or the recovery of a right. It includes both actions and proceedings. "At the suit of any citizen" may be by a proceeding, and the practice to be adopted should be of the simplest form. Any citizen, therefore, may move the court upon a petition or affidavit setting forth the grounds upon which he claims that the Apportionment Act violates the provisions of the Constitution, upon such notice as the court may require, which, doubtless, should be served upon the attorney-general and possibly the presiding officers of the two branches of the legislature, and thereupon, the court, before which the motion may be pending, must give precedence thereto over all other causes and proceedings, and if not in session it shall promptly convene and dispose of the same. I entertain the view that this provision of the Constitution was intended to give to every citizen of the state, who so desired, an opportunity to review the constitutionality of an apportionment act, and that the citizen first instituting the proceeding gives the court jurisdiction, and all other citizens desiring to move should come in and join with him, so that there may be one determination of the question, which will be final and conclusive upon all persons, and that the remedy thus given takes the place of and is exclusive of all other remedies for review which may have heretofore existed. Otherwise the door must remain open for any citizen, at any time during the ten years for which the apportionment runs, to bring up for review questions which may arise in different parts of the state with reference to the validity of the act, thus involving in doubt the *de jure* existence of every legislature that may

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be elected by the people. Under the Constitution and the statutes senatorial districts are required to be divided into assembly districts and assembly districts into election districts. This is followed by our primary and general election laws providing for the nominations of candidates and the manner of their election. A statute is presumed to be valid until its invalidity is adjudged by a court having jurisdiction so to do. If it is adjudged to be violative of the provisions of the Constitution, the previous existing law remains as if the statute had not been passed. In this case the effect would be to restore the senatorial and assembly districts as they previously existed. (*People ex rel. Farrington v. Mensching*, 187 N. Y. 8.)

Under the new Apportionment Act sixteen of the old senatorial districts remain unchanged. The remaining thirty-four districts are divided and united with other territory. By restoring the old districts it would follow that sixteen senatorial districts only would be represented in the present senate and the other thirty-four districts would not be represented; and that in the assembly the only *de jure* members would be those who represent the old districts which have remained unchanged. In that event we should be confronted with questions of grave importance which ought not to be determined by dictum or without the aid of argument, as to whether vacancies would exist in the unrepresented districts and whether it would be the duty of the governor to issue his proclamation calling special elections in such districts; or whether the present legislature, being a *de facto* body, could continue its existence during the time for which the individual members composing it were elected, notwithstanding the fact that they were elected to represent districts which were created in violation of the Constitution. It can readily be seen that such a situation would not only disarrange the machinery of the legislative branch of the government, but would create confusion and chaos in all of the other branches thereof dependent thereon; as was said by PECKHAM, J., in the case of *People ex rel. Carter v. Rice* (135

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N. Y. 473): "What is the result which would follow? In the first place we should have every enumeration and every apportionment act brought before the courts for review, and as it would not be necessary to act immediately any citizen, at any time during the running of the decennial period, would have the right to invoke the aid of the court to set aside as void any such act and leave the People to suddenly confront such a situation as is now presented. This, in itself, is sufficient to induce a court to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should such a power be exercised. \* \* \* The greatest confusion and disorder would result from a holding that this act is invalid. Whether any members of assembly could actually be elected under another law at this late day is quite problematical. The spectacle of a legislature elected under an unconstitutional law or part of the members elected under it and part under another, is one which ought not to be contemplated without the greatest anxiety by all honest citizens." I have thus called attention to the situation that confronts us for the purpose of aiding us in determining the meaning of the new provision of the Constitution under consideration as to the time when the proceeding should be instituted. As we have seen any citizen may institute the proceeding. The time within which the proceeding is to be instituted is not specifically stated, but the court is required to give the case precedence over all other causes, and if it is not in session it shall convene promptly and dispose of the same. If a citizen may take his own time for instituting the proceedings the command of the Constitution for a speedy determination by the courts would seem to be unnecessary. To my mind, the spirit and intent are apparent. If the court is to act speedily the suitor should also. While the door is thrown open to every citizen to institute the proceeding, he must act promptly so that the questions raised by him may be speedily determined and thus avoid the annulment of the other proceedings required by the Constitution and the statute with reference to the division of senatorial districts into assembly districts and other acts and

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N. Y. Rep.] Dissenting opinion, per WERNER, J.

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proceedings dependent thereon and prevent the disarrangement of the machinery of the government and the confusion and chaos that are liable to follow. The Apportionment Act became a law on the 14th day of May, 1906. The first proceeding that was instituted to have it annulled was commenced on the 27th day of July thereafter. The first appeal taken to this court is dated December 6, 1906, long after the division of the senatorial districts into assembly districts and their division into election districts and after the election of senators and assemblymen had been made thereunder. This delay was through no fault of the courts. Each court assembled speedily and at once determined the question presented to it. It is true that in this court upon the former appeals taken the orders appealed from were found not to be in form to give us jurisdiction to review; but this fact should not operate to relieve the moving parties from the situation now confronting us, which is the result of their own fault. I, therefore, favor dismissal of the proceedings upon the ground of laches.

WERNER, J. (dissenting). This court is about to annul an act of the legislature (Laws 1906, chap. 431) apportioning the state into fifty-one senate districts, and fixing the number of assemblymen to be elected in each county of the state. Against that decision I desire to record my dissent, because I deem it unnecessary in fact and unwarranted in law. Of the fifty-one senate districts into which the state has been divided, two have been selected by this court as presenting such inherent and controlling elements of invalidity as to justify the demolition of the whole of the existing legislative structure. It needs no argument that to avert such a consummation, with its inevitable train of confusion and uncertainty, the judicial department as one of the co-ordinate branches of the government should invoke every means within its power. As briefly as possible I shall attempt to convince my associates that the apportionment of 1906 was a valid exercise of legislative power, both as regards the element of legislative discretion and compliance with constitutional mandates. In this effort

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I shall not go into the constitutional history of the state, for that has been most admirably done by my brother CHASE, but will confine the discussion to those questions of immediate and practical importance that arise out of the Constitution of 1894 and the Apportionment Act of 1906.

The Constitution provides that "An enumeration of the inhabitants of the State shall be taken under the direction of the Secretary of State, during the months of May and June, in the year one thousand nine hundred and five, and in the same months every tenth year thereafter; and the said districts shall be so altered by the Legislature at the first regular session after the return of every enumeration, that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the return of another enumeration, and shall at all times, consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

"No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators." (Art. 3, sec. 4.)

It will be noted that this section of the Constitution imposes upon the legislature seven limitations in the making of an apportionment, four of which are mandatory and imperative, and three of which are coupled with discretionary pow-

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ers. The mandatory limitations are (1) that senate districts "shall at all times consist of contiguous territory;" (2) that "no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county;" (3) that "no town and no block in a city inclosed by streets or public ways shall be divided in the formation of senate districts;" (4) that no district shall "contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district." The discretionary limitations are, (1) "each senate district shall contain as *nearly as may be* an equal number of inhabitants, excluding aliens;" (2) "and be in as compact form as practicable;" (3) "counties, towns and blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts *most nearly equal* in number of inhabitants, excluding aliens."

Pursuant to the above-quoted constitutional provisions an enumeration of the inhabitants of the state was made in the year 1905, and this was followed in 1906 by the enactment of the statute, colloquially referred to as the Apportionment Law, by which the state was divided into fifty-one senate districts, and the number of assemblymen was fixed at one hundred and fifty to be apportioned among as many districts to be created by the several boards of supervisors of the counties of the state.

Under the enumeration of 1905 the citizen population of the state was 7,062,988 which, divided by 50 as directed by the Constitution, gives a ratio of 141,259 upon which to apportion senate districts. This simple sum in arithmetic revealed the cogent and immutable fact that at least twenty-three of the fifty-one senators must be allotted to the counties of New York, Kings and Erie, leaving but twenty-eight senate districts for all the rest of the state. After deducting from the total citizen population of the state that portion which was centered in the counties of New York, Kings and Erie, there was left for the other counties a total of 3,645,337

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which, when divided by twenty eight, made a ratio of 130,190 for each of twenty-eight senatorial districts to be erected in the territory extending from the Harlem to Lake Erie and from the St. Lawrence to the Pennsylvania line. Of these remaining twenty-eight districts at least nine are quite as arbitrarily fixed as the twenty-three in New York, Kings and Erie, either on account of population or geographical location. These are the districts composed of Monroe, Onondaga, Oneida, Rensselaer, Westchester, Chautauqua and Cattaraugus, Rockland and Orange, Orleans and Niagara. Thus there were really only nineteen districts the formation of which had not been practically prearranged by the express commands of the Constitution. A mere glance at the map of the state is sufficient to convince one that these districts must necessarily differ in varying degrees, in the character and number of inhabitants, configuration and topography of territory, defined avenues of travel, means of intercommunication, and legislative needs. When the apportionment of 1906 is studied in the light of these potential considerations, and of the four imperative constitutional limitations above adverted to, it seems to me to present to the judicial mind abundant reason for the differences in size, shape and population that characterize the districts which are not arbitrarily confined to the fifteen enumerated counties by the express commands of the Constitution. Since these general propositions are so obviously true as to remove them from the realm of dispute, they are alluded to only for the purpose of showing that in selecting for criticism the two particular senate districts upon which the fate of this appeal now depends, my brethren seem to have lost sight of some of the just and broad considerations that have been influential if not controlling factors in securing judicial approval of other districts no less vulnerable. These general observations sufficiently pave the way for the discussion of the two districts as to which we differ.

It is said that in the erection of the second senate district, composed of the counties of Queens and Richmond, the legis-

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lature has violated several of the express commands of the Constitution, and has so palpably transcended the limits of legislative discretion as to compel the courts to declare the Apportionment Law invalid. It is true that in the creation of this district the legislature did not obey the constitutional mandate that each senate district "shall at all times consist of contiguous territory." And why? Because compliance with that mandate was impossible. Richmond county, with a population of 66,441, is an island literally contiguous to no other territory in the state. It is practically contiguous to New York and Kings counties, but cannot be joined with either of them because the Constitution also provides that "no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county." As the population of Richmond is scarcely more than one-half of the ratio which is the basis of the apportionment, it is obvious that the legislature adopted the only alternative in joining it to the territory most contiguous, which is the county of Queens. It is said that in joining together the counties of Queens and Richmond the legislature has violated that other constitutional requirement, "that each senate district shall contain as nearly as may be an equal number of inhabitants." The appellants call attention to the fact that, although the ratio is 130,190, the county of Queens has alone a population of 179,746, or an excess of 49,556, while the addition of Richmond gives the district a population of 246,187, which makes it the largest in the state and gives it an excess of 115,977 over the ratio. For the purpose of emphasizing the alleged legislative violation of the Constitution the appellants set these figures over against the 97,717 of population credited to the district composed of the counties of Wayne and Ontario, which is the smallest in the state. This is manifestly not a fair comparison. A scrutiny of the whole list of districts clearly discloses the varying inequalities in population caused by the effort of the legislature to observe, as nearly as possible, all the other conflicting constitutional requirements as to contiguity, com-

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pactness and county lines. These inequalities, so far from evincing the legislative disregard of the constitutional command that equality of population shall be produced "as nearly as may be," are a demonstration of the necessity for compromises between co-ordinate and conflicting requirements of the Constitution. When we consider that twenty-three of the fifty-one senate districts must be assigned to three counties before there can be any attempt to apportion the rest of the state, and that another group of eleven counties must as inevitably be divided into nine of the districts now appearing upon the map as though they were specifically named in the Constitution, it becomes apparent that there were great difficulties in the division of this vast remaining domain, embracing nearly 50,000 square miles, into the remaining nineteen districts, which had to be erected with due regard, not merely to approximate equality of population, but in obedience to the other and even more positive commands of the Constitution. The smallest district as well as the largest one may have been fixed by conditions from which there was no escape. Two districts at opposite ends of the state, the one wholly urban and the other almost entirely rural, cannot fairly be compared to test the validity of either, for each may be hedged about by peculiar conditions which render it impossible to avoid inequality in population. This is well illustrated in the case of the Queens-Richmond district. The geographical location of Richmond county is such that, within the limitations of the Constitution, it cannot be joined to any territory except that on Long Island outside of Kings county. To say that it may be joined to Rockland, Putnam or any other of the so-called Hudson river counties, which are from twenty-five miles to forty miles distant, is to annihilate every constitutional command save that which relates to equality of population. Such a solution of the problem would be as unreasonable as unjust. When we turn from such an impossible alternative to the only possible one, namely, that of a union of Richmond with one or more of the Long Island counties outside of Kings, we perceive that it presents nothing more

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than a choice of evils; on the one hand, Nassau and Suffolk which, when joined to Richmond, would have a population of 203,616, or 73,426 above the ratio; on the other hand, the Queens-Richmond district as now constituted with an excess of 115,997. It must be admitted that the difference of 42,571 is a very substantial one which, other things being equal, would be conclusive in favor of the Richmond-Nassau-Suffolk district, as against the Queens-Richmond district. But other things are not equal. Nassau and Suffolk counties are not as "contiguous" to Richmond as Queens. The two former are practically suburban counties, stretching along the shore of Long Island to a remote distance, while the two latter are distinctly urban, both being boroughs of the greater city and having an identity of interest that far outweighs the difference of a few thousand in population. These and other kindred considerations were probably influential in leading the legislature to decide upon the second district as it now stands. In *Matter of Smith v. Board of Supervisors, St. Lawrence Co.* (148 N. Y. 191) the petitioner urged that there should have been a transposition of two towns in St. Lawrence county, which were on the dividing line between two assembly districts, because that would have resulted in reducing the disparity in population from 716 to 144, or a gain in favor of equality amounting to 572. In the discussion in that case of the constitutional commands to the effect that assembly districts shall be as nearly equal in number of inhabitants as may be, and that they shall be of convenient and contiguous territory, in as compact form as practicable, this court clearly recognized the ample discretionary powers delegated to legislative bodies charged with the important duties of making apportionment. In speaking of those qualified clauses of the Constitution relating to equality of population and compactness, which not infrequently conflict with the unqualified clauses relating to contiguity of territory and the division of counties, towns and city blocks, this court said: "These qualifying words indicate the clear intention of the framers of the Constitution to permit the exercise of a reasonable and honest

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discretion on the part of the supervisors, provided that in no case should there be a greater excess in population over an adjoining district than the population of a town therein adjoining such assembly district. In the exercise of this discretion they are to lay out the districts so as to be of convenient and contiguous territory, in as compact form as possible."

In view of the unique physical situation of Richmond county, which renders impossible a literal compliance with all or any of the constitutional mandates relating to apportionment, I think it cannot fairly be said that a difference in population of 42,571 in favor of some other arrangement than that adopted by the legislature is sufficient to nullify the plan for the whole state. This is especially true when we consider the decision of this court in *People ex rel. Carter v. Rice* (135 N. Y. 482), where it was held that an inequality of 135,418 between two districts in New York city was not enough to condemn the apportionment then under review. That decision, moreover, was under the act of 1892, which was bitterly impugned for partisan unfairness, while the contest at bar, so far as appears, is entirely devoid of all partisan interest.

The validity of the apportionment is further assailed in so far as it relates to the thirteenth district, which is one of the districts in the borough of Manhattan in the city of New York, and the attack is made upon the ground that it is in violation of the constitutional mandate that senate districts shall "be in as compact form as practicable." This provision as to compactness was not in the Constitutions which preceded the one adopted in 1894, and has, therefore, not been the subject of judicial construction in our courts. The noun "compactness" is defined in the Century Dictionary as "the state or quality of being compact; firmness; close union of parts." The noun "form" is defined as "the external shape or configuration of a body; the figure as defined by lines and surfaces." These two definitions clearly disclose the possibility of confounding "form" and "compactness" in cases where there is reason for preserving the distinction between them.

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To the ordinary observer a first glance at the map showing the thirteenth senatorial district would seem to suggest a plain absence of compactness when in fact it is nothing more than irregularity in form. Close union of territory does not depend upon any particular shape. In the physical world the most compact body is the complete sphere in which the center is at the same distance from every part of the surface. Next in order of compactness, perhaps, would be the perfect square, and then the parallelogram. For obvious reasons these arbitrary symbols cannot be applied to the demarkation of lands into political divisions. The rarity with which they are even approximated is shown by every geographical map ever made. It is to be observed, moreover, that the command as to compactness is qualified by the test of practicability. The senatorial districts shall "be in as compact form as *practicable*." In other words, they shall be as compact as feasible; as compact as may be, within the bounds of actual execution as distinguished from theoretical discussion. Compactness as applied to one situation may have a clear meaning that would be wholly inapplicable to a different situation. It may be one thing as applied to the Adirondack region and quite another as to a tenement-house district in New York city. I think it may also be fairly argued that the term "compact" as used in our Constitution has reference not merely to territorial compression, but to density of population and such considerations as convenience of access and unity of interest, as well as those constitutional limitations inhibiting the division of certain city blocks and enjoining the placing of others so as to produce the most approximate equality of population. When the matter is viewed in the light of these suggestions, it seems to me that a court cannot pass upon the compactness of a given district without critically going over the entire territory of which it forms a part, so as to be able to see what effect a different subdivision would have upon the whole. The most practical test of the question is to draw a rough sketch of an island of irregular shape and divide the interior into absolute squares each of which theoretically contains an equal number

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of inhabitants excluding aliens. The outer edge or fringe of the island would, in the nature of things, have to be divided into spaces of irregular shape, having a greater or lesser area than the squares, and representing corresponding differences in population. By dividing the total population of the island by the number of senate districts to be erected, the ratio for each district would be obtained. It will readily be seen that even under such an arbitrary arrangement the senate districts would necessarily have to be of irregular shapes and different sizes, thus embracing varying numbers of the squares or irregular spaces. The actual problem which confronted the legislature in the apportionment of Manhattan island was infinitely more difficult than is the illustration given above, for the reason that the population of the city blocks varies all the way from a single inhabitant in some cases, to three thousand and upwards in others, and when this situation is applied to the constitutional inhibition against the division of city blocks, it is apparent that in the effort to make districts "as compact as practicable" the legislature must be given great latitude. The question is not to be decided upon the form of one district; nor as though the courts were a second legislature with powers of revision. It must be met upon the broad ground that the courts shall not invoke the judicial power unless, after giving due heed to every practical difficulty with which the legislature has had to deal in the apportionment of a whole state, they shall regard the legislative discretion as having been so far transcended that annulment of the legislative enactment is unavoidable. The inability of courts to deal satisfactorily with questions involving the exercise of legislative discretion is very aptly expressed in *Smith v. Board of Supervisors* (*supra*) in the following language: "It is quite impossible that the carving out of these districts with a due regard to convenience, contiguity and compactness could be accomplished in a satisfactory manner except by a board of officers thoroughly familiar with the territory and having an intimate knowledge of its towns, topography and means of communication by land and water. We should not

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feel justified in interfering unless convinced that there had been a clear abuse of discretion."

It is only when we consider that there is a legal presumption that the law-making power has performed its duty in the enactment of this statute, and that if there is any doubt upon the subject it is the duty of our courts, as a co-ordinate branch of government, to resolve it in favor of the validity of the work of the legislature, that we can fully realize how utterly indefensible the creation of a particular district must be, in order to justify the judicial overthrow of the whole plan of apportionment. In this connection the language of the Supreme Court of Illinois in a similar proceeding is singularly apposite. "Absolute exactness in that respect is not attainable. The requirement of contiguity of territory has been observed in every instance, but in the formation of one, at least, of the districts it might well have been urged in the General Assembly that the requirement of compactness had not been observed and complied with as fully, fairly and justly as might be done, and that a nearer approximation to compactness was attainable. How much nearer an approximation to compactness might have been made in this district could not, necessarily, be determined in view, alone, of the territory of that district and of the other districts adjoining it, but possibly only upon a view of all the districts of the state. A change in that district might have made necessary a readjustment of the entire apportionment, and this involved the exercise of judgment and discretion of the law-making body." (*People ex rel. Heffernan v. Carlock*, 198 Ill. 150.) The only possible difference between the situation described in the case just cited and that in the case at bar, is that our legislature could have re-arranged the districts of New York city without affecting the districts in the state at large. Our courts, however, cannot do that. They must either support the whole structure or destroy it absolutely. Taking into account all the various elements that enter into a practical scheme of apportionment, I do not believe the courts should annul this act of 1906 because it is thought that the outlines of a particular dis-

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trict indicate that it is not as compact as it might have been made.

Having said all that I deem necessary about the two specific districts upon which the decision of this court is to depend, I will simply add a few general observations that may be quite as useful in pointing out the limitations upon the jurisdiction of the judicial department as in defining the extensive scope of legislative power. Under our theory of government all power is primarily lodged in the people. For practical purposes this power has been delegated to three departments, which are co-ordinate, but not necessarily in all respects co-equal. The legislative, executive and judicial departments, respectively, have powers as to which each is supreme. The power to make laws is manifestly superior to that of interpreting or executing them. Therefore, the legislative function is to that extent, and at least theoretically, paramount in dignity and efficiency to the executive and judicial functions. This I conceive to be one of the underlying principles which support the legal presumption that every statute pertaining to matters that are within the acknowledged powers of the legislature is valid and constitutional. This presumption can only be overcome by contrary proof that amounts to a demonstration. (*Fletcher v. Peck*, 6 Cranch, 87; *Ex parte M'Collum*, 1 Cow. 564; *Morris v. People*, 3 Denio, 381.) "Before courts will deem it their duty to declare an act of the legislature void as in violation of some provision of the Constitution, a case must be presented in which there can be no rational doubt. The incompatibility of the legislative enactment with the Constitution must be manifest and unequivocal." (*People ex rel. Carter v. Rice, supra*) This general rule as to the presumptive validity of legislative action is accentuated when applied to a statute providing for a reapportionment of the inhabitants of the state, because the power to adjust and readjust the political divisions of a sovereignty is as purely political when exercised by the legislature as when exercised by the people. The mere fact that this power, when exercised by the legislature, is a delegated

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N. Y. Rep.] Dissenting opinion, per WERNER, J.

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one, does not change its nature; it is always political, as distinguished from executive or judicial. Nor is it even strictly legislative. The adoption of the statute in which the power finds expression is doubtless a legislative act, but behind and beneath that act is the exercise of a power which is essentially political; the power to form and create subdivisions of the state. When the limitations upon that power are positive and arbitrary, so that the commands of the Constitution can be obeyed with mathematical precision, it follows that any substantial deviation therefrom must be fatal. But when the power is conveyed in language that not only implies but commands the exercise of discretion, it must be deemed a discretion adapted to the practical end sought to be attained; and the execution of such a power pursuant to several co-ordinate but conflicting constitutional commands, some of which are not arbitrary, but are qualified by expressions importing a grant of discretion to the legislature, is clearly beyond the reach of judicial interference unless the abuse of this political discretion is so gross and palpable that there can be no just dispute about it. Any other rule would necessarily involve the usurpation by the courts of the powers granted to the legislature. Upon that particular phase of the question before us, this court has spoken in no uncertain tone. Speaking through PECKHAM, J., it had said: "We do not believe in the propriety or necessity of any such rule. On the contrary, we think the courts have no power in such a case to review the discretion intrusted to the legislature by the Constitution, unless it is plainly and grossly abused." (*People ex rel. Carter v. Rice, supra.*) In the same case the same learned jurist shows how plain and gross must be the legislative violation of the Constitution before the courts can interfere with the work of the legislature in making apportionment, and with his very apt words I close this discussion: "There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of one hundred and twenty-eight assemblymen and thirty-two senators. Local

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pride, commercial jealousies and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that, in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking to the act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts." (*People ex rel. Carter v. Rice, supra.*)

For these reasons I vote for the affirmance of the orders made by the courts below.

VANN, WILLARD BARTLETT, JJ. (and GRAY, J., in opinion) concur with CHASE, J., and CULLEN, Ch. J.; HAIGHT and WERNER, JJ., read dissenting opinions; WERNER, J., however, concurs in so much of Chief Judge CULLEN's opinion as deals with the effect of the decision made.

Orders reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
WILLIAM NELSON, Appellant.

**CRIMES — APPEAL — UNREASONABLE DELAY.** Any unreasonable delay in bringing on for argument an appeal in a criminal case is subversive of public good and a disgrace to the administration of justice. When such delay is wholly the fault of counsel assigned to the defendant and is unexplained it merits severe criticism, and they should not be retained in the position to which they are assigned or thereafter assigned in other criminal actions.

(Submitted April 1, 1907; decided April 5, 1907.)

MOTION to affirm without argument a judgment of the Supreme Court at a Trial Term, criminal branch, in the county of New York, rendered April 9, 1906, convicting the defendant of the crime of murder in the first degree.

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N. Y. Rep.]Opinion *Per Curiam*.

The motion was made pursuant to the provisions of sections 536 and 539 of the Code of Criminal Procedure.

*William Travers Jerome, District Attorney (Robert S. Johnstone and Robert C. Taylor of counsel),* for motion.

*O'Hare & Dinnean* opposed.

*Per Curiam.* The defendant has since his arraignment been represented by a firm of attorneys assigned as counsel to him by the court. The prompt and orderly administration of justice requires that we change the counsel assigned to represent him. A brief statement of the facts appearing upon this motion will emphasize the necessity for such change. On April 9th, 1906, the defendant was convicted of murder in the first degree and sentenced to death within the week beginning May 21st, 1906. On April 26th an appeal was taken to this court. The trial was a comparatively short one, and the proposed case and exceptions should have been served on or before May 26th, 1906. It was not so served, and no extension of time was obtained or even requested therefor. On July 7th, July 26th and September 10th the district attorney, by letter, called the attention of said counsel to their default and requested that the proposed case and exceptions be served. No reply was made to either of said letters and on September 14th a formal notice requiring that the return herein be filed within ten days was served upon them. It was not so filed. A motion was made in this court October 15th, upon due notice to said counsel, to dismiss the appeal. They did not appear in person in this court or file any papers in explanation of their delay, but one of said counsel wrote a letter to the clerk of this court in which he stated that he had been informed by the district attorney that an order requiring the service of the case and exceptions within sixty days would be satisfactory. An order was made by this court October 23rd denying the motion and granting said counsel sixty days in which to perfect the appeal. (186 N. Y. 554.) A copy of the order so made was served upon

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them. They again made default in serving the proposed case and exceptions. After the time to serve the same had expired and on December 31st the district attorney wrote them calling their attention to the default, to which letter they did not reply. This motion was made April 1st, 1907, upon due notice served upon said counsel March 21st. They have not appeared in person upon this motion, but have filed an affidavit in which one of the counsel alleges that since the middle of November, 1906, and until a recent date, he has been ill, and further alleges that the proposed case and exceptions is now ready to be served. No affidavit is filed by the other counsel. We are in receipt of a letter from the defendant, who is confined in the death chamber at the Sing Sing Prison, in which he says that the motion papers herein were served upon him and that he then wrote to his counsel but that he is unable to get any reply from them. Assuming that the defendant's appeal has merit, an affirmation of the judgment without argument on account of the negligence and default of his counsel is a most severe penalty which we hesitate about imposing.

This state has by statute given every person charged with crime a reasonable opportunity to establish his innocence. To that end when a person charged with crime is unable to employ counsel the court must assign counsel to aid him. The counsel so assigned acts as an officer of the court. In a case where a person is charged with murder in the first degree, or upon an appeal from a judgment of death, the court in which the defendant is tried or the indictment is otherwise disposed of, or by which the appeal is finally determined, may allow such counsel his personal and incidental expenses and a reasonable compensation for his services not exceeding the sum of five hundred dollars. When a person is convicted of murder in the first degree an appeal acts as a stay of execution without obtaining a certificate of reasonable doubt as is required in other cases. All of the provisions mentioned are for the purpose of enabling a person so charged with crime to obtain a fair and impartial trial and to give to him every rea-

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Opinion *Per Curtam.*

sonable opportunity to show that he is not guilty of the crime with which he is charged. The stay in capital cases should not be used simply for the purpose of delaying the execution of the judgment of death. The provisions of the statute quoted, which are designed for the public good as well as for the protection of innocent persons accused of crime, should not be allowed to become the means of discrediting the administration of criminal justice in this state. The intention of the legislature in capital cases is that a final determination of such criminal actions shall be had with all reasonable speed. Such intention is shown by providing that the appeal shall be taken directly to this court, and by the further provisions of the Code of Criminal Procedure (sections 536 and 539) that where the judgment appealed from is of death the appeal must be brought on for argument within six months, unless the court for good cause shown shall enlarge the time for that purpose, and that judgment of affirmance may be given without argument if the appeal shall not have been brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall have enlarged such time. The delay frequently observed in criminal actions is not the fault of the courts. Any unreasonable delay, particularly in such actions, is subversive of the public good and a disgrace to the administration of justice, and when it is properly brought to the attention of the court action will be taken to prevent its continuance. The delay in this case seems to have been wholly the fault of the counsel assigned to the defendant. Their delay is unexplained, and it merits the severe criticism of this court. When counsel assigned to aid a person accused of crime indulge in such delay, without reasonable excuse, they should not be retained in the position to which they are assigned, or thereafter assigned, by the court in other criminal actions.

The assignment of counsel in this case is revoked and John D. Lindsay, attorney of New York city, is assigned as counsel for said defendant to represent him on the appeal herein, and said counsel heretofore assigned to said defendant are

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directed to immediately deliver to said Lindsay all papers that they have in their possession or control relating to this case, including the proposed case and exceptions prepared by them.

The defendant's default is opened and the proposed case and exceptions herein may be served on the district attorney on or before May 10, 1907.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ., concur.

Ordered accordingly.

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RICHARD W. BUCKLEY, Respondent, *v.* CALVIN G. DOIG et al., as Administrators of the Estate of ROBERT McCAFFERTY, Deceased, et al., Respondents, and JOHN McCAFFERTY, Individually and as Executor of WILLIAM McCAFFERTY, Deceased, et al., Appellants.

1. PARTNERSHIP — WHEN LANDS OWNED BY FIRM DEALING IN REAL ESTATE DEEMED TO BE CONVERTED INTO PERSONALTY BY PARTNERSHIP AGREEMENT. Where a partnership formed for that purpose has carried on the business of dealing in real estate as a commodity, buying it absolutely for the purpose of improving and selling it and either dividing the proceeds of the sale amongst the partners or reinvesting it in more real estate to be similarly dealt with, carrying it upon the firm books indiscriminately with personal property as part of the assets of the firm, and this course of conduct is in accordance with and confirmatory of an oral agreement for a copartnership and for a conversion of the real estate into personalty upon dissolution of the firm or disagreement of the partners, a trial court is justified in finding as a matter of fact an implied intention and agreement upon the part of the copartners that there shall be a conversion of their real estate into personalty for all purposes, and that such intention and agreement will apply to real estate happening to be undisposed of at the death of one of the copartners upon a distribution of his estate as between his heirs at law and personal representatives.

2. WHEN SUCH CONVERSION NOT IN CONFLICT WITH REAL PROPERTY LAW (L. 1896, CH. 547, § 207). A partnership for dealing in real estate may be created by parol and the question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personalty is incidental to the relation of copartnership. Its disposition is governed by the agreement, express or implied from the acts of the copartners, and the finding of an intention for a conversion does not conflict either with the spirit or the letter of the statute

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(Real Property Law [L. 1896, ch. 547] § 207), which provides that "An estate or interest in real property, \* \* \* or any trust or power over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same."

**3. EVIDENCE—EFFECT OF EXCHANGE OF DEEDS BETWEEN PARTNERS.** Where it appears that a short time before the death of one of two copartners carrying on business under such agreement, and in view of his apprehended death, deeds were passed between the partners so as to invest each one upon the record with a half interest in each parcel of land then on hand and which included some, or all, of the lands remaining after the death of such partner, that fact does not conclusively indicate an intent that the real estate, held by the firm, should be regarded as such and not as personality, where other inferences are deductible therefrom and no change was made upon the partnership books whereby the real estate was charged up to the respective partners in accordance with the deeds which were executed or in any manner withdrawn from the copartnership agreement and arrangements as they had always existed.

*Buckley v. Doig*, 115 App. Div. 418, affirmed.

(Argued February 28, 1907; decided April 9, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1906, affirming a judgment entered upon the report of a referee which determined the respective claims of the personal representatives and heirs at law of Robert McCafferty, deceased, to the latter's interest in certain copartnership real estate.

The facts, so far as material, are stated in the opinion.

*Albert B. Boardman, Henry W. Clark and Frank S. Gannon, Jr.*, for appellants. No out and out conversion of the real property was ever effected. No express agreement for a conversion is claimed. The facts do not warrant the application of the doctrine of equitable conversion as affecting the succession to this property. (*Smith v. Jackson*, 2 Edw. Ch. 28; *Patterson v. Brewster*, 1 Edw. Ch. 352; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Buckley v. Buckley*, 11 Barb. 43; *Collumb v. Read*, 24 N. Y. 505; *Darrow v.*

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*Calkins*, 154 N. Y. 503; *Foster's Appeal*, 74 Penn. St. 391; *Haeberly's Appeal*, 191 Penn. St. 239; *Carter v. Flexner*, 92 Ky. 400; *Lennon v. Fones*, 48 Ark. 557.) If an agreement for a conversion ever existed it was not in force at the time of McCafferty's death; the real property in question was withdrawn from the operation of any such agreement on November 12, 1902. (*Steward v. Blakeway*, L. R. [4 Ch. App.] 603; *Lenon v. Fuoer*, 48 Ark. 557.)

*John L. Hill* and *Robert L. Redfield*, for plaintiff, respondent. The finding of an agreement for an absolute conversion was supported by sufficient evidence and is conclusive upon the appellants. (*Ostrom v. Greene*, 161 N. Y. 353; *Ensign v. Ensign*, 120 N. Y. 655; *Cooke v. Whipple*, 55 N. Y. 150; *Greenwood v. Marvin*, 111 N. Y. 423; *Burgess v. Simonson*, 45 N. Y. 225; *Darrow v. Calkins*, 154 N. Y. 503; *Coster v. Clarke*, 3 Edw. Ch. 428; *Barney v. Pike*, 94 App. Div. 199; *Collumb v. Read*, 24 N. Y. 505; *Hiscock v. Phelps*, 49 N. Y. 97; *Fairchild v. Fairchild*, 64 N. Y. 471.) The question of the mutual understanding and intention of the partners in executing the deed in November, 1902, is one of fact, and there having been no finding of such intention and none having been requested, it cannot be assumed in this court that any such existed. (*Trustees of East Hampton v. Vail*, 151 N. Y. 463; *First Nat. Bank v. Dana*, 79 N. Y. 108; *Henry & Co. v. Talcott*, 175 N. Y. 385; *Thomson v. Bank of B. N. A.*, 82 N. Y. 1; *Palmer v. Cypress Hills Cemetery*, 122 N. Y. 429; *Koehler v. Hughes*, 148 N. Y. 507; *Burnap v. Nat. Bank of Potsdam*, 96 N. Y. 125; *Ostrander v. Hart*, 130 N. Y. 406.) The finding that the deeds were executed in 1902 is not inconsistent with the further finding that the lands remained partnership property at McCafferty's death. (*Trustees, etc., v. Vail*, 151 N. Y. 463; *Snyder v. Seaman*, 2 App. Div. 258; *Town v. M., etc., Co.*, 116 N. Y. 1.)

*Amasa R. Angell* for defendant, respondent.

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Hiscock, J. This action was brought to effect a settlement of the affairs of a copartnership composed of plaintiff and one Robert McCafferty, deceased, and especially to procure a sale and distribution of the proceeds of a number of parcels of real estate which belonged to said copartnership at the time of the death of McCafferty.

The only substantial issue involved is whether said real estate is to be regarded as having been so converted for all purposes into personalty that the share of the deceased partner therein after payment of copartnership debts and adjustment of equities between the copartners will pass to his personal representatives rather than to his heirs at law. To state it in a slightly different form the question is whether there has been an out and out conversion of this copartnership real estate for all purposes, and even as between heirs and next of kin, or only a qualified one for the purposes and interests of the copartnership. The learned referee and Appellate Division have adopted the former view, and while the question is a perplexing as well as an interesting one, we think that their conclusions are justified by the facts presented.

A proper consideration of the questions of law requires a somewhat detailed statement of the facts.

The case is relieved of the uncertainty and embarrassment which sometimes attend the decision of a question of this character by the common agreement of all the parties that the plaintiff and the deceased were copartners, and that the real estate in question was copartnership property. Neither is there any conflict of evidence as to what occurred in connection with the copartnership. This was formed in 1877 to deal in real estate under an oral agreement, which is thus detailed by the plaintiff: "We were to form a copartnership and each share half and half, \* \* \* and we were to divide the profits at the end of the job, or, if we felt like it, take the money and re-invest it in more land, which we did, and have been doing for the last thirty years. I said to Mr. McCafferty, or Robert — he was my brother-in-law — 'Now what if any disagreement occurs between us? We ought to have

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some distinct understanding what to do.' 'Well,' he says, 'we will sell everything and divide the money between us.' \* \* \* We were to divide the profits in the transaction. The principal subject we talked about was the disposition of the partnership assets on a dissolution of the firm. What was said about that was that if any dissolution of the partnership should occur, or we had any disagreement, we should sell all our holdings and divide the profits. As to what disposition should be made of the proceeds of lands sold in case of loss, we were to divide the losses like we divided the profits."

This conversation occurred before and with reference to the purchase of three or four pieces of real estate, but without any other or different arrangement said persons thereafter continued to purchase, improve and sell real estate down to the time of McCafferty's death in 1905, when the real estate in question was on hand, except that the transactions of the firm were not very active for two or three years prior to McCafferty's death, on account of his ill-health.

It is conceded that the partnership was formed and continued for the purpose of dealing in real estate rather than of holding it as an investment or as a means of carrying on any other business, and that all the real estate purchased was sold as rapidly as a suitable price could be obtained therefor. During the continuance of the firm there was invested in the purchase of lands the sum of \$1,686,189 and in the improvement thereof the sum of \$2,232,903. No capital was contributed by the partners, but their transactions were conducted with profits or with moneys borrowed upon the property, the proceeds being invested and re-invested as property was marketed. Regular copartnership books were kept, upon which was opened an account with each piece of property, the final balance being debited or credited to a profit and loss account according as there was a profit or loss upon the transaction. An account was also opened with each partner in which he was debited with moneys drawn by him or paid out on his account and credited with any payments on account of the firm. At the end of each year an inventory was prepared

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upon which was entered without discrimination a statement of the copartnership real estate and personal properties. The deeds of the real estate purchased ran sometimes to one of the partners and sometimes to both of them, but in the latter case contained no reference to the copartnership, and the habendum clause was in the ordinary form of that running to tenants in common.

In 1902 deeds were passed between the partners so as to invest each one upon the record with a half interest in each parcel of land then on hand, and which included some or all of those involved in this action. This was done at the suggestion of the deceased partner, who said "he wanted the interest divided and his half interest conveyed from him to Mr. Buckley and from Mr. Buckley to him when necessary, in order that each might have a half interest in each piece of property. \* \* \* He said about his condition of health: 'I am in very poor health, indeed, and can't tell what will happen, and would like to have these titles straightened so that each will have a half interest on the records.'" No change was made upon the copartnership books to accompany or as the result of these transfers upon the record, but the real estate was carried thereafter as common copartnership property the same as before.

Mainly upon the evidence thus summarized the learned referee, manifestly after the most careful and thorough consideration, in substance found as matters of fact, amongst other things, that the oral agreement above referred to not only covered and applied to the four lots then purchased but was intended to and did cover and apply to all lots subsequently purchased; that such agreement and the conduct of the partners under it showed that it was their intention that all the real estate purchased and improved by them should be treated as personal property; that the real property belonging to said firm was always considered by the partners to be personal assets and was uniformly so treated in their mutual dealings with each other; that the agreement of copartnership provided that upon dissolution of the firm or in case of any

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disagreement between the partners the real property then remaining on hand should be sold and the proceeds thereof divided between the partners.

These findings if sustained by any evidence are binding upon us and in connection with the other facts found lead to an affirmation of the conclusion that there has taken place a conversion of the real estate for all purposes.

The determination of the extent to which the theory of conversion into personality of copartnership real estate will be carried in this state in a given case is made difficult by much contradiction of authorities and uncertainty. In England the general rule is that equity will regard such real estate as converted into personality for all purposes. This rule is adopted by the courts of different states, including our own, so far as may be necessary to provide for payment of firm debts or the adjustment of partnership equities, but it has not been observed to the extent of treating such property as converted as a matter of course between the heirs and next of kin of a deceased partner. Upon that branch of the question there has been much variance in the decisions.

We think, however, that the great weight of authority in this country has established the primary and fundamental rule with which we may start, that even between such heir and personal representative a conversion will be regarded as having been worked when such was the intent of the partners either as evidenced by express agreement or fairly deducible from facts and circumstances. Thus Story on Partnership (sect. 93, sixth edition) says: "Indeed, so far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personality, and governed by the general doctrine of the latter. And so it will be deemed in equity to all other intents and purposes, if the partners themselves have, by their agreement or otherwise, properly impressed upon it the character of personality."

And Shumaker on the Law of Partnership (2nd ed. chap. 145) says: "It is generally conceded in all jurisdictions that the question whether partnership real estate shall be deemed

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absolutely converted into personality for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where, by such agreement, it appears that it was the intention of the partners that the lands should be treated and administered as personality for all purposes, effect will be given thereto." (See, also, Burdick on Partnership [2nd ed. 1906], page 110; *Darrow v. Calkins*, 154 N. Y. 503.)

And so we come to the precise query whether the evidence in this case authorized the referee to find within the rule above stated that it was the intent and understanding of the partners that their real estate should be treated as personality for all purposes, and that they did thereby impress upon it the characteristics which will control even as between the heir and the personal representative. We think it did authorize him so to find.

The learned counsel for the appellants insists that the finding with reference to the oral agreement is somewhat broader than the agreement itself and that the latter did not provide for a sale of real property and distribution of proceeds in the event of the death of a partner. The agreement did provide for such course upon the dissolution of the copartnership and it might be said that the death of a partner which worked a dissolution came within the specific terms of the agreement. We do not, however, regard it as necessary to hold that the oral contract specifically provided for a conversion in case of a death, for whether it did do this or not we regard such agreement as significant as indicating a general purpose and expectation that the real property would be converted into personality. The agreement was quite far reaching in its terms and even if it omitted to provide for some particular contingency, it is useful as indicating the general attitude of the partners towards their property with reference to the question now under discussion.

But we go beyond this parol agreement and regard as a much sounder and safer basis upon which in the main to predi-

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cate our conclusions, the acts of the parties continued through a period of twenty-five years.

We agree that a conversion should not be adjudged as between the heirs and personal representatives except upon evidence clearly warranting such a determination and that it would be unsatisfactory and unsafe to base such a determination upon a mere oral agreement made many years before. We do not feel that we are at all indulging in any such dangerous course in this case. We look at the conceded acts of the parties. For a long period of years they purchased real estate for the sole purpose of improving and selling it. They had no intent permanently to hold it as an investment or as a means, like a warehouse, store or factory, of carrying on some other business. The only business which they had was that of dealing in the real estate itself as a man would deal in any other commodity of personal property. They contemplated its conversion into personality as rapidly as possible in order that the proceeds of one piece might either be re invested in another or divided amongst the partners as profits. Their course of dealing necessarily involved treating the property as ordinary merchandise, and its regular and unfailing conversion. Their acts during all of these years entirely conformed to and were in accordance with the agreement said to have been made between them and as we think fully warrant the belief that they intended that the real estate at all times and for all purposes should be regarded and treated as personality.

If we are correct in this view, we do not think that the character which they thus generally impressed upon the real estate in which they were dealing should be terminated and withdrawn from a piece of it happening to be undisposed of at the death of a partner, but that the character once impressed upon it should continue to prevail even as between heirs and representatives of such partner.

As already indicated, we are aware that decisions and dicta may be found opposed to our conclusions even upon facts somewhat similar to those here disclosed, and the learned counsel for the appellant with much care and discrimination

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has called them to our attention. So far as the cases cited relate to instances where the real estate was held permanently for investment or as a means of carrying on some business or trade, we do not regard them as closely applicable, for it seems to us that there is a wide difference between such a case and one where the copartnership deals in real estate as merchandise.

It will not be possible within proper limits to review all of the other cases which may appear to be more akin to this one. We shall content ourselves with a brief reference to those arising in the courts of this state cited by the appellant's counsel in support of his contentions, it being very fairly conceded by him that none of those cases are entirely decisive of the question as now presented.

The cases of *Coster v. Clarke* (3 Edwards' Ch. 428); *Patterson v. Brewster* (4 Edwards' Ch. 352); *Delmonico v. Guillaume* (2 Sand. Ch. 366), and *Buchan v. Sumner* (2 Barb. Ch. 165), while each contained some discussion of the subject of conversion, either did not involve or did not pass upon the question as between heirs and personal representatives under circumstances at all similar to those presented here.

Especial reliance, however, is placed upon the cases of *Smith v. Jackson* (2 Edwards' Ch. 28) and *Buckley v. Buckley* (11 Barb. 43). The first case did involve the disposition of the proceeds of copartnership real estate, some of which had been bought upon speculation and entered upon the copartnership books as "merchandise." The question involved, however, was whether the proceeds of this copartnership property should pass to a trustee for copartnership debts or to the personal representatives of the deceased partner, and whatever was said about the respective rights of personal representatives and heirs of such deceased partner was beyond the necessary decision of the question actually presented.

In the latter case the question of conversion arose with reference to the proceeds of permanent copartnership real estate and fixtures used in the conduct of a regular business, and

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while the opinion contains a most interesting and exhaustive review of the decisions, both in England and in this country, and reaches the conclusion that there was not a conversion in that case, for reasons already intimated it is not regarded as entirely applicable to the facts in this case. Moreover, this case enunciates a rule which is substantially in accordance with the one now being adopted, the opinion stating: "These cases leave no doubt as to the law in this state; and this is reasonable. It is clear that all (the matter of conversion as between personal representatives and heirs at law) depends upon the intention of the parties, and in the absence of any expressed intention to that effect, how can it be presumed that a man intends to convert real estate into personal and break the descent merely because a portion of the partnership funds are appropriated for the purchase of real estate?"

The case of *Fairchild v. Fairchild* (64 N. Y. 471) was an action of partition, and although some observations were made upon the subject of conversion, no such question was involved.

Next we pass to a review of the authorities which, in our opinion, sustain the decision that the facts in this case warranted the finding of an intention upon the part of the partners for a general conversion.

Burdick on Partnership (2nd ed., page 111) says: "But effect ought to be given to the intention of the partners in whatever manner it may be disclosed. When real estate is purchased with firm funds and is treated by the partners as a part of the firm assets an agreement for conversion may well be inferred."

In *Morrill v. Colehour* (82 Ill. 618) land was purchased for the purpose of sale and acquisition of profits only, and not for permanent use. It was held that such property would be regarded in equity as personal property among the partners in the speculation, the court saying: "It was not bought to hold as land, but simply as an article of commerce, and for speculation, and for that reason equity regards it as personal property among the partners. In such cases the intention of the parties stamps the character of the transaction."

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In *Lowe v. Lowe* (13 Bush's Kentucky Reports, 688) the court, after reference to the opinion of Story, that in the absence of an agreement for an absolute conversion into personality of partnership real estate, the claims of the heir must prevail, says: "This seems to us to be the true doctrine, with this modification, that the agreement necessary to be shown may be either express or implied. If express, of course, no difficulty can arise; but if no agreement be expressed, then the court is to decide on all the facts whether the partners intended their real estate to be treated as part and parcel of their capital stock, not only for the purposes of the partnership, but for all purposes. When such agreement or intention is shown from the nature of the partnership business, the character and extent of the real estate involved, and the partners' mode of treating and considering it, it should be held to be personality, not only for partnership purposes, but for the purposes of distribution also. But in the absence of such facts and circumstances as will warrant the court in finding that it was intended or agreed by the partners that their real estate should be regarded as personality for all purposes, it should only be so regarded for the purposes of the partnership."

In *Heirs of Ludlow v. Cooper's Devisees* (4 Ohio St. 1) a partnership was formed for the purpose of buying, improving and disposing of lots by donation and sale, the parties being equal partners in the property and under an agreement to contribute equally all payments and to share in the profits or proceeds arising from the sale of lands. The court said: "The language of the agreement in this case is: 'The parties are to be equal in all payments toward the purchase money, as also in the profits or proceeds of the sale of said lands, or any part of them.' Taking this whole agreement together, there can be little doubt but that the partners intended that this property should be sold as partnership property, and thereby converted, out and out, into personality, and that either the surviving partner or the present representatives of the deceased partner, could, in a court of equity, have compelled a sale and division of the profits. If so, it belonged, in equity, to the

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administrators of Ludlow (one of the partners) and not to his heirs."

In *Rammelsberg v. Mitchell and Lape* (29 Ohio St. 22) it is said: "There is no doubt that if, by the terms of the partnership articles, real estate be purchased with partnership funds, or be put otherwise into the partnership stock, to be used and held solely for partnership purposes, it is to be regarded as converted out and out into personality, so that the heir at law takes no beneficial interest therein in any event, but the proceeds not needed for partnership purposes pass to the personal representatives of the copartners. \* \* \* We see no good reason for holding that an agreement in writing is necessary for such conversion. Undoubtedly the intention to convert out and out should be made to appear clearly; but such intention may be inferred from circumstances with sufficient clearness. \* \* \* We are of opinion that such conversion is sufficiently shown where real estate is purchased for partnership purposes, paid for with partnership means, and used solely for the conducting of the partnership business."

In *Gilbraith v. Gedge* (16 B. Monroe's Rept. 631) it is said: "The views expressed in the foregoing opinion are to be confined, of course, to the facts as they appear in the record. In regard to the character in which the land is held, it only appears that the partners are 'tobacconist merchants, and trading and dealing in real estate,' and that the land was purchased with the money of the firm. These facts alone do not, in our opinion, authorize the conclusion that the partners had impressed upon the land the character of personal estate, and that they intended it to be used and disposed of as such. It does not appear that it was purchased to be used for partnership purposes, and to be employed and disposed of as personal property. If real estate be purchased by partners with partnership means, for partnership purposes; that is, be so purchased to be used, dealt with and disposed of as personality, it should, for commercial convenience, partake of the character which the partners have thus impressed upon it, and, upon

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the dissolution of the partnership by the death of one of the partners, the interest of the deceased partner ought to belong, as personality, to the executor or administrator, and not descend to the heir, and should be treated in all respects as personal estate. But, as already said, we do not think that the facts in this record are sufficient to authorize the conclusion that the partners had impressed upon the land in contest the character of personality." (See, also, *Hughes v. Allen*, 66 Vt. 95; *Lenoir v. Fones*, 48 Ark. 557.)

Three cases decided by the courts of this state merit attention, two of them pre-eminently so.

*Columb v. Read* (24 N. Y. 505) involved consideration of the question whether copartnership real estate was to be regarded as converted into personality, and in the course of his opinion Judge DENIO stated: "Where land is conveyed to two or more persons by a common deed of conveyance they become tenants in common, and each is at law considered separately seized of his individual share as fully as though they derived title under separate conveyances from different sources. But if the tenants in common are at the same time copartners and the land was purchased with partnership funds, and for partnership purposes, it is deemed in equity converted into personal property, and is liable to be administered as such in winding up the affairs of the firm; and it goes, moreover, to the personal representative, and not to the heirs of a deceased partner." It must be admitted, however, that the question of conversion as between heirs and personal representatives was not involved in this case, and that, therefore, what was said upon that subject must be regarded as expressive of the views of the learned judge writing the opinion rather than of the court.

The case of *Darrow v. Calkins* (154 N. Y. 503) involved the question whether the title to an undivided half interest of lands conveyed by deed running jointly to two partners descended to and vested in the heirs of one of them, and there was no question that the real estate was copartnership property. While the court decided the case upon another point, and did

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not finally pass upon the question whether there had been a conversion of the realty as between the heirs and personal representatives, that question did receive consideration which was so pertinent that what was said can scarcely be regarded as mere dictum. The learned Chief Judge ANDREWS said : "It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personality for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the parties themselves, and that where by such agreement it appears that it was the intention of the partners that the lands should be treated and administered as personality for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of partnership business, the fact that the two species of property are in most cases of this kind so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that, under such circumstances, the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock and that both together should take the character of personality for all purposes, and Judge DENIO, in *Collumb v. Read* (*supra*), expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the parties when ascertained, is conceded by most of the cases."

*Burney v. Pike* (94 App. Div. 199) was a case where four parties entered into an oral partnership agreement which provided that the partnership capital should be furnished by the parties in certain prescribed proportions, and "that the capital

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thus contributed should be invested in the purchase of marsh lands to be reclaimed and sold and converted into money, and the proceeds and profits or losses should be divided among said partners in proportion to their several interests therein, such sales and distribution to be made as soon as the lands were reclaimed or on the dissolution of the partnership"; also that the title to the partnership lands should be taken in the name of one of the partners. The question was directly presented whether the interest of a deceased partner in the lands was to be regarded as real or personal estate, and it was held that under the agreement in question there was an equitable conversion of the lands into personal property for all purposes, including the transmission of the interest of a deceased partner to his personal representatives instead of the heirs.

We think that these authorities and sound reason justify the conclusion that where a partnership formed for that purpose has carried on the business of dealing in real estate as a commodity, buying it absolutely for the purpose of improving and selling it and either dividing the proceeds of the sale amongst the partners or reinvesting it in more real estate to be similarly dealt with, carrying it upon the firm books indiscriminately with personal property as part of the assets of the firm, and this course of conduct is in accordance with and confirmatory of an oral agreement for a copartnership and for a conversion of the real estate into personality upon dissolution of the firm or disagreement of the partners, a trial court is justified in finding, as a matter of fact, an implied intention and agreement upon the part of the copartners that there shall be a conversion of their real estate into personality for all purposes, and that such intention and agreement will apply to real estate happening to be undisposed of at the death of one of the copartners upon a distribution of his estate as between his heirs at law and personal representatives.

We do not regard as well founded the suggestion that the theory of conversion is in conflict with the statutory provision (Real Property Law, L. 1896, ch. 547, sec. 207) that "An estate or interest in real property, \* \* \* or any trust or

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power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same."

It is sufficiently well settled that a copartnership for dealing in real estate may be created by parol. (*Chester v. Dickerson*, 54 N. Y. 1; *Fairchild v. Fairchild*, 64 N. Y. 471; *Williams v. Gillies*, 75 N. Y. 197.)

The question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personalty is incidental to the relation of copartnership. Its disposition is governed by express agreement or that implied from the acts of the copartners, and in our opinion the finding of an intention for a conversion does not conflict either with the spirit or the letter of the statute referred to.

But finally it is earnestly urged that even if the general facts and circumstances attending the formation and conduct of this copartnership would authorize the finding of an intent and agreement for conversion, such facts, circumstances and finding must yield to and are prohibited by special considerations, reference being made to the deeds passed between the copartners shortly before the death of McCafferty, and it being urged that these transfers conclusively indicate an intent to regard the real estate as such and not otherwise. Probably such effect might have been given by the trial court to those acts. Upon the other hand, we think other inferences were deducible therefrom. Mr. McCafferty was contemplating death and it was not unnatural that, as expressly stated by him, he should desire that the record title of the real estate still on hand should conform to the actual and equitable interests of the respective partners. As a layman he might imagine more possibilities than really existed of complications resulting from a lodgment of titles not in accordance with the real interests of himself and his copartner. This idea might furnish the motive for what was done rather than any thought of influencing the disposition and

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distribution of his partnership interests in the event of death. No change was made upon the partnership books whereby the real estate was charged up to the respective partners in accordance with the deeds which were executed or in any manner withdrawn from the copartnership agreement and arrangements as they had always existed.

In his disposition of the case the learned referee has seen fit to adopt this latter line of inferences rather than the other one, and has made findings of fact upon the subject which we think were authorized and which, therefore, are controlling upon us.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, VANN and WILLARD BARTLETT, JJ., concur; HAIGH and WERNER, JJ., dissent.

Judgment affirmed.

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JOHN ADAMSON, Appellant, *v.* THE CITY OF NEW YORK,  
Respondent.

MUNICIPAL CORPORATIONS — WHEN DESTRUCTION OF BUILDING BY CROWD DOES NOT CONSTITUTE RIOT AND RENDER CITY LIABLE FOR DAMAGES UNDER GENERAL MUNICIPAL LAW. The destruction of an unoccupied frame building by a varying crowd of young men and boys numbering from eight to thirty, there being no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance, but on the contrary, it appearing that when a policeman approached, the crowd ran away, does not constitute the offenders guilty of riot within the meaning of section 449 of the Penal Code, so as to entitle the owner to recover from a municipality the value of the building under section 21 of the General Municipal Law (L. 1892, ch. 685), providing that a city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby.

*Adamson v. City of New York*, 110 App. Div. 58, affirmed.

(Argued March 15, 1907; decided April 9, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered February 1, 1906, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial.

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The nature of the action and the facts, so far as material, are stated in the opinion.

*Paul Eugene Jones* for appellant. If the liability of the city is statutory, then the liability should be ascertained by following the definition of our statute as to what makes "a mob or riot." (*Regina v. Langford*, Carr. & M. 602; *Marshall v. City of Buffalo*, 50 App. Div. 149; *People v. Most*, 128 N. Y. 108; *Duryea v. Mayor, etc.*, 10 Daly, 300.) At common law such an act as would make a trespass would make a riot if done by three or more acting in concert. (*Reed v. Gainsbury*, 4 D. & R. 250; 1 Hawkins Pleas, ch. 65, pp. 293-296; *Queen v. Soley*, 11 Mod. 116.) Proof of an intention to resist the civil authorities never was required to be shown in case of riot, either in civil action or criminal prosecution at common law. (*Sampson v. Chambers*, 4 Campb. 221; *King v. Chambers*, 1 Stark. 195; *Beaton v. Rushforth*, 7 Taunt. 45; *Reed v. Gainsbury*, 4 D. & R. 250; *Marshall v. City of Buffalo*, 63 App. Div. 603; *Rea v. Wood*, 2 Stark. 269; *Clark v. Burdett*, 2 Stark. 504; *King v. Chambers*, 1 Stark. 195; *Sampson v. Chambers*, 4 Campb. 221; *Newcastle v. Broxtowe*, 1 N. & M. 598.)

*William B. Ellison*, *Corporation Counsel* (*James D. Bell* and *James W. Covert* of counsel), for respondent. Plaintiff's property was neither destroyed nor injured by a mob or riot, but that destruction was brought about by a number of independent acts, constituting a separate crime for each individual, but not a general crime for which the city is made liable. (1 Stephen Hist. Cr. Law, 188; 2 Reeves Hist. Eng. Law, 122; 1 Pike's Hist. Crimes, 220; *Duryea v. Mayor, etc.*, 10 Daly, 300; *Marshall v. City of Buffalo*, 50 App. Div. 149; 63 App. Div. 603.)

HISCOCK, J. Plaintiff was the owner of a two-story frame building in the borough of Brooklyn. It had been unoccupied for three or four months prior to November 5, 1901,

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which was election day, and during that period had been subjected to various depredations which left it in a somewhat dilapidated condition. Upon the latter day it was practically demolished by a varying crowd of young men and boys estimated by different witnesses to have numbered from eight to thirty. The demolition took place in the daytime and the persons who accomplished it are said by one of the witnesses to have had an axe and a crowbar, and by others simply to have had some rope and pieces of pipe and timber with which to pry the building apart. As soon as one of the trespassers had secured a piece of the house he ran away with it and another took his place. There was no disturbance except such as was naturally incidental to such a proceeding and there was no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance which might be offered, but, upon the other hand, when a policeman appeared the crowd ran away. At the same time in other portions of the police precinct boys and men were stealing wood for bonfires.

Upon these general facts plaintiff has sought to hold the respondent, the city of New York, liable for the value of his building upon the ground that it was destroyed by a mob or riot, basing his action upon section 21, chapter 685 of the Laws of 1892, known as the General Municipal Law, which in part reads as follows: "A city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby."

The learned Appellate Division has decided that there was no such evidence of a mob or riot as would entitle the plaintiff to recover, and we agree with this view.

Section 449 of the Penal Code defines riot as follows: "Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property; or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot."

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In interpreting this statute which defines an offense well known at common law, we are entitled to seek aid from common-law definitions of such offense. (*People v. Most*, 128 N. Y. 108, 113.)

A frequently quoted definition of the term riot is that given by Hawkins in his "Pleas of the Crown," namely: "A tumultuous disturbance of the peace by three persons or more assembling of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature and afterwards actually executing the same in a violent and turbulent manner to the terror of the people whether the act intended were of itself lawful or unlawful."

Greenleaf adopts a definition evidently based upon that given by Hawkins and to the effect that to constitute a riot "It is necessary that there be three or more persons tumultuously assembled of their own authority with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature or of a lawful act in a violent and tumultuous manner."

Interpreting the statute upon which plaintiff bases his right of action in the light of the provision quoted from the Penal Code and assisted as we may be by the foregoing common-law definitions, we think that the evidence fails to disclose the existence of a mob or riot at the time plaintiff's property was destroyed. As we use and contemplate those terms we naturally think of an unlawful assemblage of people of threatening attitude acting in concert with disorder and violence and determined to accomplish some injury to person or property in spite of any resistance which may be offered. It is apparent, of course, that not every illegal interference with property by three or more people would come within the definition of a mob or riot, but that many such infractions of law would constitute trespass or larceny or some kindred offense. The acts complained of in this case, in our opinion, come within the latter category rather than within the definition of the offense which plaintiff has sought to establish.

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The boys and men who perpetrated them in constantly shifting numbers were evidently stealing and carrying away the material of plaintiff's house for some ulterior purpose not fully disclosed, and their conduct in dispersing whenever a policeman appeared indicated any other purpose than that of proceeding with force or violence to accomplish their purpose, acting in concert and mutually assisting one another against any one who should oppose them.

We think the case can clearly be distinguished from those which have been called to our attention as authorizing a recovery.

In *Solomon v. City of Kingston* (24 Hun, 562) it appeared that a crowd which had assembled at a fire broke into plaintiff's store and carried away his goods and that these acts were accompanied by violence toward those who were attempting to protect the property against the assembly. It was scarcely contended upon the part of the defendant that the gathering which finally caused the injury to plaintiff's property did not constitute a mob or a riot, but the defense was rather based upon other considerations which are not involved here.

In *Marshall v. City of Buffalo* (50 App. Div. 149) it was proven that a crowd of men, women, boys and girls appeared upon the premises of the plaintiff with shovels, axes and other tools and commenced to demolish the building and carry the material away in wagons; that from 100 to 200 people were engaged in the work of destruction which continued for three days until only the foundations were left, and it was held that it might be fairly inferred and found from the evidence that they were executing the common purpose of unlawfully demolishing and removing the building and that there was a preconcerted plan to that effect upon the part of many people, and that the jury were entitled to draw the conclusion that the buildings in question were unlawfully and with force and violence demolished and ruined by a riotous and disorderly mob in the execution of a common purpose and in defiance of law and order.

The case of *Regina v. Langford* (Carrington & Marsh-

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man's Reports, 602) involved an indictment under a statute for riotously and feloniously demolishing a house. The statute contained no definition of the term riot and the court resorted to the one drawn from Hawkins which has already been quoted. It was held that a riot must be attended with circumstances of terror to the people and that this essential element was established in the case at bar and hence a conviction was allowed.

In each of these cases there was present an element of concerted action and violence in attacking those who offered resistance to the execution of an unlawful plan, or of a large and tumultuous gathering against public peace and order which carried out its unlawful destruction of property with preparation and deliberation, or of unlawful conduct calculated to inspire terror and, therefore, coming within the particular statutory definition there applicable, and none of which features are here present.

This case, upon the other hand, comes within the principles adopted in *Duryea v. Mayor, etc., of N. Y.* (10 Daly, 300; aff'd., 100 N. Y. 625) where it was held that the conduct of a collection of boys and young men who destroyed a building and who showed no intent to resist opposition by the public authorities or private citizens, but upon the other hand dispersed at the coming of a single police officer, was to be regarded as malicious mischief and trespass rather than the acts of a mob and riot. The distinguishing facts of that case are quite similar to those presented here and we think that it outlines a more correct course for us to follow than would be adopted if we should hold that the acts now being complained of were of such a character as to impose a liability upon the municipality for the destruction of property by mob violence.

The order appealed from should be affirmed and judgment absolute rendered upon the stipulation, with costs in all the courts.

CULLEN, CH. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Order affirmed, etc.

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**ALBERT TOMPKINS et al., Respondents, v. FONDA GLOVE LINING COMPANY, Appellant.**

**1. CONDITIONAL SALE — ORAL CONTRACT.** Where machinery is sold to a corporation under an oral agreement by which the title was to remain in the vendors until the payment by the vendee of the purchase price, for which drafts were given, the transaction constitutes a conditional sale, although the agreement being oral is not filed as required by statute.

**2. EVIDENCE — WHEN DECLARATIONS BY DECEASED OFFICER OF CORPORATION AGAINST HIS INTERESTS ARE ADMISSIBLE IN ACTION AGAINST THE CORPORATION.** Where the vendee, while in default in the payment of the drafts given for the purchase price of the machinery, transferred it, together with other personal property, to a firm who were large creditors of the vendee, and such firm sold the machinery to a corporation against which the vendors brought an action for the conversion of the machinery, declarations made by a deceased stockholder and director of the defendant who had negotiated the purchase of the machinery for the defendant, are properly admitted to prove that the defendant had knowledge of the plaintiffs' claim of title to the machinery; not because the person making such declarations was an officer of the defendant, but for the reason that the declarant was dead; that he possessed competent knowledge of the facts and that the declarations were at variance with his interests and, therefore, likely to be true.

**3. CONVERSION — ACTION AGAINST PURCHASERS OF PROPERTY SOLD BY VENDEES IN POSSESSION UNDER CONDITIONAL SALE — WHEN FAILURE TO DEMAND PROPERTY IS FATAL TO ACTION OF CONVERSION.** Where it is found by the trial court, upon the trial of such action, "that no sufficient demand for the restoration of the property in question was made before the commencement of this action," such finding, approved by a unanimous decision of the Appellate Division, is fatal to a recovery by the plaintiffs, where it appears that after the default the vendor allowed the machinery to remain in the hands of the vendees, and, therefore, they had an interest which they could sell to the defendant, since it is the general rule that where property comes lawfully into the possession of a party he cannot be charged with conversion in failing to surrender it to the owner unless a demand therefor is made.

*Tompkins v. Fonda Glove Lining Co.*, 105 App. Div. 637, reversed.

(Argued March 18, 1907; decided April 9, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 5, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

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The nature of the action and the facts, so far as material, are stated in the opinion.

*Andrew J. Nellis* for appellant. When Hilton sold and delivered the machinery to the Cayadutta Knitting Company, and agreed with it and with plaintiffs that the title to the machinery should remain in plaintiffs until the drafts which Hilton had originally accepted as purchase price of the property should be fully paid, nothing more was intended or effected than the giving of chattel security for the payment of the purchase money. (*Weston v. Brown*, 158 N. Y. 360; *Wait v. Green*, 36 N. Y. 556; *Ballard v. Burgett*, 40 N. Y. 314; *Mott v. H. Nat. Bank*, 22 Hun, 359; *Hintermeister v. Lane*, 27 Hun, 497; *Donnelly v. McArdle*, 86 App. Div. 33; *Herryford v. Davis*, 102 U. S. 235; *C. R. E. Co. v. M. Nat. Bank*, 136 U. S. 268; *Earle v. Robinson*, 91 Hun, 363; *Brewer v. Ford*, 54 Hun, 116.) The trial court erred in admitting the declarations claimed to have been made by Titus Sheard, a director of the defendant, on the 23d of August, 1902, to the effect that he had notice of plaintiffs' claim when the sale was made to the defendant on the 31st of July, 1902. (*F. Nat. Bank v. O. Nat. Bank*, 60 N. Y. 278; *Cosgray v. N. E. P. Co.*, 22 App. Div. 455; *Goetz v. M. S. R. Co.*, 54 App. Div. 365.) The court erred in deciding as matter of law that the defendant unlawfully converted the machinery to its own use prior to the commencement of this action. (*Nelson v. Neil*, 12 Wkly. Dig. 154; *Goodwin v. Wertheimer*, 99 N. Y. 149; *Leven v. Smith*, 1 Den. 571; *Phelps v. Bostwick*, 22 Barb. 314; *Hall v. Robinson*, 2 N. Y. 293; *Brown v. Cook*, 9 Johns. 361; *Ryerson v. Kauffeld*, 13 Hun, 387; *Gilbert v. M. I. Mfg. Co.*, 11 Wend. 625; *W. T. Co. v. Iron Works*, 100 N. Y. Supp. 254; *Stevens v. Hyde*, 32 Barb. 171.)

*William W. Morrill* for respondents. The testimony of Ernest Tompkins to declarations of Titus Sheard was competent. (*Bump v. Pratt*, 84 Hun, 201; *Griffin v. Train*, 90 App. Div. 21; *McDonald v. Wesendonck*, 30 Misc. Rep.

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601; *Bartlett v. Patton*, 10 S. E. Rep. 21; *Vogley v. Bloom*, 45 N. W. Rep. 10; *Heidenheimer v. Johnston*, 13 S. W. Rep. 46; *Hart v. Kendall*, 8 So. Rep. 41; *Friborg v. Douwan*, 23 Ill. App. 58.) There is no error in the sixth finding of law, namely, "that the defendant unlawfully converted the said machinery to its own use prior to the commencement of this action." (*Pease v. Smith*, 61 N. Y. 477; *Bernstein v. Warland*, 33 Misc. Rep. 282; *Hovey v. Bromley*, 85 Hun, 543; *Holden v. N. Y. & E. Bank*, 72 N. Y. 286; *Craigie v. Hadley*, 99 N. Y. 131; *M. Nat. Bank v. Tracey*, 77 Hun, 443; *Farrington v. Payne*, 15 Johns. 431; *Hallett v. Carter*, 19 Hun, 629; *Keefer v. Green*, 41 N. Y. S. R. 452.)

CULLEN, Ch. J. The action is for the conversion of a quantity of machinery, the subject of a conditional sale made by the plaintiffs to the Cayadutta Knitting Company in 1896. The condition of the sale was that the title to the property sold by the plaintiffs should remain in them until the payment by the vendee of the purchase price, for which certain drafts were given. These drafts were renewed from time to time, but never paid. In 1901 the knitting company transferred the machinery, together with other personal property and real estate, to the firm of Littauer Brothers, who were large creditors of the company. In 1902 the property was sold by Littauer Brothers to the defendant, who, in consideration thereof issued a portion of its capital stock. The agreement between the plaintiffs and the knitting company was oral and, of necessity, was not filed as required by the statute; but the trial court found that both Littauer Brothers and the defendant had knowledge of the plaintiffs' title and that neither was a purchaser in good faith. It, therefore, awarded the plaintiffs the value of the goods converted. The learned counsel for the appellant, in an elaborate argument, contends that in effect the transaction between the original parties was not a conditional sale but a chattel mortgage and, therefore, void. We think this claim is not well founded, and that there are only two objections to the recovery which require our notice.

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The evidence given by the plaintiffs to show that the defendant had knowledge of their claim were declarations of Titus Sheard, a stockholder and director of the defendant company, who negotiated the purchase of the property in suit from Littauer Brothers. Sheard had died before the time of the trial. This evidence was admitted against the objection and exception of the appellant, who contends that such admission was error. We think the law is settled otherwise. The fact that Sheard was a director and officer of the defendant did not render his admissions or declarations admissible as against the defendant. (*First Nat. Bank of Lyons v. Ocean Natl. Bank*, 60 N. Y. 278.) They were admissible, however, on another ground of which his connection with the defendant forms no factor, except that it was through that connection that the declarations made were against the interest of the declarant. Mr. Greenleaf states the rule (Evidence, sec. 147): "A third exception to the rule, rejecting hearsay evidence, is allowed in the case of declarations and entries made by persons since deceased, and against the interest of the persons making them, at the time they were made. We have already seen that declarations of third persons, admitted in evidence, are of two classes, one of which consists of written entries, made in the course of official duty or of professional employment \* \* \*. But declarations of the other class, of which we are now to speak, are secondary evidence, and are received only in consequence of the death of the person making them. This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interests." Wigmore on Evidence (Vol. 2, sec. 1469) is to the same effect. The exact question was decided by this court in *Lyon v. Ricker* (141 N. Y. 225) in accordance with the rule stated in the authorities cited. There

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Judge PECKHAM, after reviewing the authorities, said: "The court receives declarations of a deceased person against his interest because of the likelihood of their being true, of their general freedom from any reasonable probability of fraud, and because they cannot be set up or proven until the death of the party making them. We think it plain that the declarations of the deceased grantor were admissible against the defendant, although the latter claimed nothing under the grantor, and was not, therefore, strictly in privity with him." (See, also, *Bump v. Pratt*, 84 Hun, 201; *Griffin v. Train*, 90 App. Div. 16.)

The second objection, however, we think fatal to the recovery. Though the evidence may have admitted of a different conclusion, the trial court found, at the request of the defendant, "That no sufficient demand for the restoration of the property in question was made before the commencement of this action." The universal rule in this state is that where property comes lawfully into the possession of a party he cannot be charged for a conversion in failing to surrender it to the owner unless a demand therefor is made (*Gillet v. Roberts*, 57 N. Y. 28), and this rule applies although in his answer the defendant may set up a hostile title and claim to own the property. (*Goodwin v. Wertheimer*, 99 N. Y. 149.) In the present case the plaintiffs, after the default of their vendee in the payment of the purchase money allowed it to continue in possession of it. They could not charge the vendee with conversion until after demand (*O'Rourke v. Hadcock*, 114 N. Y. 541), and under the recent decision of this court, until the defendant's vendors were in default, those vendors had an interest of which they might dispose. (*Davis v. Bliss*, 187 N. Y. 77.) Therefore, the purchase by the defendant was not a wrongful act.

The judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur; CHASE, J., not sitting.

Judgment reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. HENRY C. MARCH, Respondent, v. ANDREW J. BEAM et al., as Inspectors of Election of the Village of East Rochester, Appellants.

1. ELECTION LAW—VOID AND PROTESTED BALLOTS—JURISDICTION OF COURTS TO CORRECT ERRONEOUS DISPOSITION THEREOF. Where inspectors at a village election, in spite of written and oral protests, received ballots which were not only unofficial, but objected to as marked for identification, and counted them and then caused them to be locked and sealed up with the valid ballots voted at the election, their action was a violation of section 111 of the Election Law (L. 1896, ch. 909), and the Supreme Court has the power and jurisdiction to command that the ballot box containing these void, unofficial and protested ballots should be opened and those ballots removed and placed in a package and disposed of according to the commands of said section, to the end that the proceedings authorized by section 114 of the act may be instituted if any candidate voted for at such election should so desire.

2. MANDAMUS—WHEN WRIT DIRECTING CORRECTION OF ERRORS MADE BY INSPECTORS IS VOID FOR WANT OF JURISDICTION—SUPREME COURT HAS NO POWER TO ORDER RECANVASS OF BALLOTS. Where a candidate, voted for at such election and declared defcated upon the count of all the ballots voted, official and unofficial and those objected to as marked for identification, institutes proceedings for a peremptory writ of mandamus commanding that the inspectors make a correct canvass and certificate of the result of the election by deducting the votes counted upon the unofficial ballots and upon those marked for identification; that such ballots be indorsed as objected to upon the ground that they were unofficial and marked for identification, and, together with the official ballots, be returned as required by section 111 of the Election Law, and that such inspectors do all things necessary to the end that a correct canvass and certificate of said ballots be made in compliance with the Election Law, an order of the Special Term directing a writ of mandamus granting the relief asked for is erroneous, and the writ, in so far as it commands a recanvass of the votes and a proclamation of the result, is void for want of jurisdiction.

*People ex rel. March v. Beam*, 117 App. Div. 374, modified.

(Argued February 20, 1907; decided April 9, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 31, 1907, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to

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compel the defendants to re-assemble and correct their certificate of canvass of votes cast at the village election.

The facts, so far as material, are stated in the opinion.

*Merton E. Lewis* for appellants. The Election Law does not authorize the issuance of a writ of mandamus to compel a recount of ballots. (*People ex rel. Brink v. Way*, 179 N. Y. 174; *Matter of Hearst v. Woelper*, 183 N. Y. 274; *Matter of Stiles*, 69 App. Div. 589.) The applicant has mistaken his remedy. (*People ex rel. Hoyt v. Board of Supervisors*, 19 Misc. Rep. 671; *People ex rel. Lewis v. Brush*, 146 N. Y. 60; *Green v. Knox*, 76 App. Div. 415.)

*Harvey F. Remington* for respondent. Mandamus is the proper remedy and the common law will come in in aid of the statute in the issuing and sustaining of the writ of mandamus. (*Weston v. Charleston*, 2 Pet. 449; *People v. Schillien*, 95 N. Y. 132; *People ex rel. Decker v. Parmelee*, 22 Misc. Rep. 380; *People ex rel. Stapleton v. Bell*, 119 N. Y. 175; *People v. Bd. of Comrs.*, 97 N. Y. 37; *People ex rel. Boltzer v. Daly*, 37 Hun, 461; *People v. Meakim*, 56 Hun, 626; *People v. Whitestone*, 71 Hun, 188; *Chittenden v. Wurster*, 152 N. Y. 364.)

EDWARD T. BARTLETT, J. The village of East Rochester, Monroe county, recently incorporated, held its first election of officers on the 13th of November, 1906. At that election there was but one official ballot prepared by the clerk for the use of the electors, upon which appeared the name of the relator, Henry C. March, as a candidate for president; also the names of two trustees, one for a short term and the other for a long term, a treasurer and a collector. This ballot contained as a party emblem the wood cut of a house; also on the right side, as required by law, a blank column, with spaces for the names of the five candidates, and a notice to the voter that under the title of the office he could insert the name of any person for whom he desired to vote. This ticket was called the "People's Ticket."

On the morning of election a large number of unofficial

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ballots were brought into the polling place containing nominations for the various offices, naming persons other than those on the official ballot. This ballot was styled the "Citizens' Ticket," and was headed by one T. Joseph Mitchell as candidate for president. There were three inspectors of election present on that day; one has since died, and the two survivors are the defendants in this proceeding.

One Frank C. Hamilton swears that at the opening of the polls at such election he objected to the use by the inspectors of any but the official ballots furnished by the village clerk; that at the same time there was handed to the inspectors a package of unofficial ballots, and that such ballots were so handed to the electors by the inspectors over his protest; that he observed the inspectors received both kinds of ballots, according to the choice of the elector, and deposited them in the box for the reception of ballots and the stubs in the box prepared for the stubs taken from ballots legally voted. He also swears that at the close of the election, before any ballots were opened and before any votes were canvassed, he served upon each of the inspectors of election a written notice, addressed to the board of inspectors, and reading as follows:

"GENTLEMEN.—The undersigned duly qualified voter of said village respectfully demands that you refrain from opening and counting the ballot box containing unofficial ballots received by you at said election held November 13th, 1906. That in case you do open the box and canvass such ballots, or any ballots cast for T. Joseph Mitchell and others, then and in that case that you endorse upon said ballots 'objected to because marked for identification.' That you specify over your signatures that said ballot is objected to on the ground that it is unofficial and marked for identification by reason of it being entirely blank where endorsement is required to be made. That you return all of said unofficial ballots so-called, with the void and protested ballots, as required by section 111 of the Election Law.

"(Signed) FRANK C. HAMILTON,  
"Watcher for the People's Party."

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After swearing to the number of ballots cast of both kinds, Hamilton further avers: "I further say that while said ballots were being counted I again requested each inspector to endorse upon each unofficial ballot a statement to the effect that the same was objected to for the reason that it was marked for identification, in that it had no endorsement thereon and could be readily discerned from the official ballot, and that I requested each inspector several times to do up securely all of the 199 unofficial ballots so voted for T. Joseph Mitchell, and to return the same with the void and protested ballots, as provided in section 111 of the Election Law, which the inspectors refused to do." It further appears that all the ballots cast at this election, official, unofficial and protested as marked for identification, were counted and placed in a ballot box which was locked and sealed. The result of this election was that 326 votes were cast for president. The relator received 116 votes, and Mitchell, the candidate heading the unofficial ballot, received 210 votes.

In this condition of affairs application was made to the Special Term for a writ of peremptory mandamus. The petition for the writ asked for various forms of relief. The writ was granted, commanding the inspectors to correct their certificates of canvass, make a correct certificate of the result of the election by deducting the votes counted upon the unofficial ballots, commanding that they indorse upon the unofficial ballots the statement that such ballots were objected to because marked for identification, and that they specify over their signatures that each of said ballots was objected to on the ground that it is unofficial and marked for identification; and that such inspectors return all of the official ballots cast at such election, with the void and protested ballots, as required by section 111 of the Election Law, and that they make a return and canvass in all respects as required by the Election Law, and that they properly proclaim the correct count and file such statement of canvass with the village clerk of the village of East Rochester in the manner required by law, and that each of said defendants do all things neces-

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permits and commands a recanvass of the vote and a proclamation of the result is void for want of jurisdiction. The order and writ should be modified in accordance with the views expressed in this opinion and as so modified affirmed, without costs in this court to either party.

GRAY, J. (dissenting). I must dissent from the opinion in this case. Its adoption amounts to a judicial amendment of the Election Law. The order for the writ in this case does not, as the opinion seems to assume, provide for the opening of the election ballot boxes and their examination, simply, as is permitted by section 111 of the Election Law; it undertakes to accomplish something very different, as its mere reading, even as modified by the opinion, will show. The defendants, who were the election inspectors, are, in effect, to recanvass the ballots cast at the election in accordance with the directions of the order. They are to make certain indorsements upon the ballots which are in the sealed ballot boxes and they are to return them separately, with a statement of their recount; notwithstanding that the ballot boxes are to be kept inviolate by law. The Election Law, to which the relator appeals and upon which the order for the writ, in terms, is based, in regulating the conduct of elections, provides for the issuance of the writ of mandamus in only two cases. Section 114 provides for such a writ, in review of the action of the election officers, when what is sought is the recount of the ballots which have been marked for identification, or a determination whether ballots rejected as void shall be counted. Section 111 of the Election Law, expressly, requires the ballots which have been voted to be placed in a ballot box, which is to be locked, sealed and preserved inviolate for six months after the election, and provides that they may be only opened and their contents examined when so ordered by the court. The only ballots, which may be brought into court through the instrumentality of a writ of mandamus, are those which, under section 111, were "secured in a separate sealed package" as having been marked for identifica-

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tion, or rejected as void. These special provisions of sections 111 and 114, necessarily, exclude by implication any right to the writ of mandamus for the purpose of a recount of the ballots, which are in the sealed ballot boxes, or for any purpose having to do with the handling of such ballots, or with the alteration of the result certified as to such ballots. If the action of the officers with respect to the ballots placed in the sealed ballot boxes is to be the subject of judicial review, it is only possible through a judicial proceeding, in which the right of the incumbent of the office is in contest. Naturally, for the purpose of such a proceeding the court may order, under the provisions of section 111, the opening of the boxes and the examination of their contents; which would then be done, with proper safeguards, by, or under the supervision of, the court. Within the intentment of the Election Law, as is, indeed, the fact, the sealed ballot boxes with their contents, upon the close of an election, have passed out of the hands of the election inspectors. The opinion, therefore, advises a violation of the provisions of the Election Law and is in conflict with what we have held in the cases of *Matter of Hearst v. Woelper*, (183 N. Y. 274), and of *People ex rel. Brink v. Way*, (179 ib. 174).

That any inherent power resides in the court to make the order, either as it originally was made, or as the opinion modifies it, is, of course, inconceivable, when the Election Law specifies the cases, in which the writ of mandamus may issue to review the acts of the election inspectors.

There is good reason for confining the issuance of the writ of mandamus to the cases specified in section 114. The purpose of the provision of that section and of section 111 is that the results of an election shall not be kept in doubt, nor the public mind be kept in agitation, by ill advised, or frantic, applications of defeated candidates for orders, generally, reviewing the action of the inspectors of election; whether by way of a recount of the ballots voted, or, as it will be in the present case, by ways which result in a recount. The formalities of the Election Law having been complied with, the result may only be con-

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tested in two ways; partially, by the summary method of mandamus proceedings to review the decision of the inspectors upon the protested, or void, ballots; or, wholly, through the orderly procedure of an action in the nature of quo warranto, instituted by the defeated candidate to try his opponent's right to hold office, upon charges with respect to the election, which challenge the correctness of the whole count and involve the validity of the ballots received and preserved in the ballot boxes. The result of such an action would determine the right to the office and would determine the controversy. It appears to me that the interest of the public is better promoted by such a course. If this relator is right in his contention that the unofficial ballots voted and received at the election in question were illegal and should not have been counted, he should be remitted to such an action against the occupant of the office for which he was a candidate, wherein a final judgment might be rendered determining conclusively the question as between them.

CULLEN, Ch. J., HAIGHT, VANN and CHASE, JJ., concur with EDWARD T. BARTLETT, J.; WERNER, J., concurs with GRAY, J.

Ordered accordingly.

In the Matter of the Appraisal under the Transfer Tax Act  
of the Estate of GEORGE W: KIDD, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant;  
W. MORTON GARDEN, as Executor, et al., Respondents.

1. TRANSFER TAX — WHEN PROPERTY PASSING UNDER AN ANTE-NUP-TIAL CONTRACT, WHEREBY A DECEDENT AGREED TO MAKE A WILL IN FAVOR OF THE BENEFICIARY NAMED THEREIN IS SUBJECT TO TAX. Where it has been adjudicated by the Supreme Court, in an action brought by the stepdaughter of a testator against his executors and trustees and the beneficiaries named in his will, that she was entitled to all of the real and personal property of testator, under an ante-nuptial agreement between him and her mother whereby he agreed to devise and bequeath all of his property to such stepdaughter, if no children should be born of his marriage with her mother, and the judgment directed the

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defendants to execute and deliver to the plaintiff all necessary releases and conveyances of such property, the property passing to testator's stepdaughter under such judgment is not exempt from taxation under the Transfer Tax Act (L. 1896, ch. 908, art. 10), since the contract, enforced by such judgment and under which testator's stepdaughter receives the property, was not a contract to convey the property, but a contract to make a will in her favor and even if the testator had performed his agreement and given her his property by his will, the estate would have been subject to the tax.

**2. SAME—LIABILITY OF PROPERTY TO TRANSFER TAX NOT AFFECTED BY RESORT TO THE COURTS TO ENFORCE THE CONTRACT.** The fact that testator's stepdaughter, in consequence of the failure of testator to carry out his agreement, was obliged to resort to the courts for relief, does not affect the question of liability of the estate to the transfer tax; the judgment did not set aside the will, but enforced the ante-nuptial contract and converted the devisees under the will or the heirs at law or next of kin of testator, as the case may require, into trustees for the beneficiary under the agreement, so that the devolution of testator's property has, in fact, taken place under the will and is subject to the transfer tax.

*Matter of Kidd*, 115 App. Div. 205, reversed.

(Argued April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 5, 1906, which affirmed an order of the New York County Surrogate's Court adjudging the estate of George W. Kidd, deceased, to be exempt from a transfer tax.

The facts, so far as material, are stated in the opinion.

*Eugene D. Flanigan and Robert C. Cumming* for appellant. The oral agreement alleged to have been made between Anna Estelle Slocum with George W. Kidd, prior to her marriage with him, was in contemplation of his death, was not payment of any legal debt, but was a gift of gratuity, and as such is liable to taxation. (*Matter of McPherson*, 104 N. Y. 316; *Matter of Greene*, 153 N. Y. 223; *Smith v. Edwards*, 81 N. Y. 92; *Matter of Crane*, 164 N. Y. 71; *Matter of Reickman*, 42 Misc. Rep. 648; *Matter of Gould*, 156 N. Y. 423; *Matter of Seaman*, 147 N. Y. 69; *Matter of Swift*, 137 N. Y. 88.) The will was admitted to probate as a valid instrument, is still in full force and effect, and the

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residuary estate thereunder passed to and vested in the trustee, and the residuary legatees were impressed with no trust, and is, therefore, taxable. (*Piper v. Hord*, 107 N. Y. 73; *Johnson v. Spicer*, 107 N. Y. 185; *Colby v. Colby*, 81 Hun, 221; *Fairchild v. Edson*, 154 N. Y. 199; *Amherst College v. Ritch*, 151 N. Y. 282.) The equitable rights of Mrs. Dickinson, arising from the alleged ante-nuptial contract of Kidd to devise his property to her, and owing to which the residuary legatees under the Kidd will were required by a court of equity to transfer to Mrs. Dickinson the property which passed to them as legatees under the will, were not testamentary in their character, but arise from matters *dehors* the will, and do not affect the legal title of the residuary legatees derived under the will, or the taxability of the interests thus received by them as such legatees. (*Matter of Edson*, 38 App. Div. 19; 159 N. Y. 568; *Amherst College v. Ritch*, 151 N. Y. 342; *Cullen v. Attorney-General*, L. R. [1 Eng. & Ir. App.] 190; 14 Irish C. L. R. [N. S.] 137; *Matter of Gould*, 156 N. Y. 423.)

*Henry Hirschberg, Joseph F. McCloy and Charles C. Dickinson* for respondents. The right as a property right to the future possession of George W. Kidd's entire estate accrued to and vested in Grace Georgette Dickinson upon the marriage of her mother to said George W. Kidd, and execution of the ante-nuptial agreement in 1875, ten years prior to the passage of the first Transfer Tax Act; and said estate ultimately passed into her possession, neither by will nor by intestacy laws, but solely by virtue of said contractual obligation. It is too well settled to be now questioned that under such circumstances its transfer was exempt from taxation. (*Matter of Demers*, 41 Misc. Rep. 470; *Matter of Craig*, 97 App. Div. 289; 181 N. Y. 551; *Matter of Baker*, 83 App. Div. 530, 178 N. Y. 575; *Matter of Miller*, 77 App. Div. 473.) The estate of George W. Kidd never passed to any one by virtue of his last will and testament, and the codicil thereto and title to said estate never vested in the

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legatees and devisees mentioned in said will or in the trustee or executor thereof. (*Matter of Wolfe*, 89 App. Div. 349; 179 N. Y. 599; *Matter of Cook*, 187 N. Y. 253.)

CULLEN, Ch. J. George W. Kidd died December 3rd, 1901, possessed of an estate exceeding in value \$800,000. He left a will which was admitted to probate by the surrogate of the county of New York on April 5th, 1903. By his will he created a number of trusts, the ultimate remainders in which were contingent. The details of the will are immaterial. It is sufficient to say that proceedings having been instituted to determine the amount of the transfer tax, an agreement was entered into in March, 1905, between the executor and the state comptroller, under the provisions of section 230a of the Tax Law, compromising the tax at the sum of \$10,000, which was paid to the comptroller. Before this time one Grace G. Dickinson, a stepdaughter and a beneficiary to a limited extent under his will, brought an action in the Supreme Court against the executors and trustees of Mr. Kidd's will and the other beneficiaries thereunder, alleging an ante-nuptial agreement between her mother and the said Kidd, whereby, in consideration of the marriage and the promise of her mother to turn over to him the sum of \$40,000, to be used in his business, the said Kidd agreed "that he would adopt said Grace G. Slocum (now Dickinson), give her his name and make her his heir and that in case there should be issue of said marriage he would by will bequeath and devise all of his property equally to and among the said child and his other children, and in case there should be no issue of said marriage, then in that case he would devise and bequeath all of his property to the said Grace G. Slocum;" the performance of said agreement by her mother and the failure of the deceased to perform the same on his part. The pleadings in that action are not in this record; we have merely the findings and the judgment. The trial court found the facts as alleged and judgment was entered declaring the contract recited to be a valid contract entitling

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the plaintiff to all the property, real and personal, of which the deceased died seized or possessed, and directing the defendants to execute and deliver to the plaintiff all necessary releases and conveyances of said property. Thereafter the executor of the will and Mrs. Dickinson instituted this proceeding to have the estate declared exempt from taxation. The application was granted by the surrogate, and the order granting it has been affirmed by the Appellate Division by a divided court.

While the principal argument before us has been devoted to the question whether the compromise made between the executor and the comptroller can now be set aside or attacked collaterally, we do not find it necessary to consider the question since we are of opinion that, giving full effect to the judgment in the Supreme Court action, nevertheless the estate is liable to the transfer tax. The contract between the plaintiff's mother and the deceased, which has been enforced by the judgment of the Supreme Court, was to bequeath and devise to his stepdaughter by will, either the whole property he might leave or a portion of it, dependent on the existence of other children. It was not a contract to convey, but a contract to make a will in her favor. Had the deceased performed his agreement and given her his property by will the estate would have been subject to the tax. Substantially this proposition was decided in *Matter of Dows* (167 N. Y. 227). In that case the property which was the subject of the proceeding was a part of the estate of the elder Dows, who died prior to the enactment of any law imposing a tax on succession by lineal descendants. By his will Dows the elder authorized his son, the equitable life tenant of a trust fund, to appoint by his will the corpus of the trust fund among his issue. It was there contended by the appointees of the son that they took under the will of their grandfather and were not subject to the tax imposed by statutes subsequent to his death. We held that, "when David Dows, Sr., devised his property to the appointees under the will of his son, he necessarily subjected it to the charge that the state might impose on the

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privilege accorded to the son of making a will" and upheld the tax. This decision was affirmed by the Supreme Court of the United States (*sub nom. Orr v. Gilman*, 183 U. S. 278). *Matter of Delano* (176 N. Y. 486; affirmed by Supreme Court (*sub nom. Astor v. Kelsey*) April 15th, 1907) is to the same effect. In that case, long before any succession tax, William B. Astor conveyed certain real estate to his daughter for life, with power of appointment by will, and in default of appointment then remainder over. The daughter died at a time when there was an inheritance tax, leaving a will by which she appointed the remainder. It was held that the estate was subject to the tax. The present case plainly differs in principle from those cited by the learned counsel for the respondent, such as *Matter of Pell* (171 N. Y. 48); *Matter of Baker* (178 N. Y. 575, affg. 83 App. Div. 530 on opinion below); *Matter of Craig* (181 N. Y. 551, affg. 97 App. Div. 289 on opinion below), and *Matter of Lansing* (182 N. Y. 238). In the *Pell* case the remainderman claimed under a will which had taken effect by the death of the testator in 1863. The estate vested in title though not in possession at that time. It was at all times alienable by the remainderman and also devisable and descendible, unless the limitations of the remainder were such as to make it fail on his death. This is true of the other cases cited. Mrs. Dickinson had no such interest in the estate of the deceased. While the testator could not have conveyed it in fraud of her rights, he could have entirely consumed it in living expenses or by speculation.

It does not affect the question of the liability of the estate to taxation that in consequence of the failure of the testator to carry out his promise Mrs. Dickinson was obliged to resort to a court for relief. The method by which a court of equity in a proper case (for there is not in all cases an absolute right for its enforcement) enforces an agreement of the character of the one before us, is well settled. It does not set aside the will, for in the present case such a judgment would do the plaintiff in the Supreme Court action no good; she was neither heir at law nor next of kin; but it converts the devisees

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under the will or the heirs at law or next of kin, as the case may require, into trustees for the beneficiary under the original agreement. The subject has been quite recently before us in the case of *Phalen v. United States Trust Company* (186 N. Y. 178). There Judge WERNER wrote for the court: "The principle upon which such agreements are sustained was stated by Lord CAMDEN as early as the year 1769 in *Durfour v. Fer-raro* (Hargrave's Jurid. Arg. 304) and it was not then new \* \* \* 'Though a will is always revocable and the last must always be the testator's will, yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement. A covenant to leave so much to his wife or daughter, etc. \* \* \* These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke. This court does not set aside the will, but makes the devisee, heir or executor trustee to perform the contract.'" Therefore, the devolution of the property has, in fact, taken place under the will and such devolution is subject to the transfer tax.

The orders of the Appellate Division and of the Surrogate's Court should be reversed and the application denied, with costs in all courts.

O'BRIEN, HAIGHT, HISCOCK and CHASE, JJ., concur;  
EDWARD T. BARTLETT and VANN, JJ., dissent.

Orders reversed, etc.

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WALTER H. AYERS, Respondent, *v.* THE GRAND LODGE OF  
THE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE  
OF NEW YORK, Appellant.

1. MUTUAL BENEFIT SOCIETIES—WHEN BY-LAWS AFFECTING CERTIFICATES OR POLICIES OF LIFE INSURANCE CANNOT BE AMENDED. While a "mutual benefit fraternity," or fraternal insurance society, may so amend its by-laws as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond

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the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution. (Art. 1, § 10.)

**2. WHEN BY-LAW RESTRICTING BUSINESS OR OCCUPATION OF INSURED IS VOID AS TO CERTIFICATE PREVIOUSLY ISSUED.** Payment of a certificate of life insurance issued by a "mutual benefit fraternity," or society, upon which dues had been paid by the assured and accepted by the society to the time of his death, cannot be avoided upon the ground that the assured, at the time of his death, was, and for a few months prior thereto had been, engaged in the hotel business, in violation of a by-law adopted by the society, without notice to the assured, many years after his certificate was issued, prohibiting any certificate holder of the society from selling liquors at retail, and declaring the certificate of any one engaging in such business void for a violation thereof, where neither the certificate in question, or the application therefor, nor the by-laws under which the certificate was issued, contained any restriction as to the business in which the assured might engage.

**3. AGREEMENT, IN APPLICATION FOR CERTIFICATE, TO OBEY ALL LAWS AND REGULATIONS ENACTED AND TO BE ENACTED, DOES NOT JUSTIFY CHANGE IN BY-LAWS AFFECTING VESTED RIGHTS.** The fact that in the application, upon which the certificate was issued, the assured agreed to comply with all laws, regulations and requirements of the society which were then, or might thereafter be enacted, there being no reservation in the by-laws of the specific right to amend them so as to restrict the occupation, or business, of the assured, did not permit an amendment in that respect without the consent of the assured, and the attempt made without his consent was beyond the power of the society and absolutely void; since the effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right of which the assured could not be deprived without his consent.

*Ayers v. Ancient Order of United Workmen*, 109 App. Div. 919, affirmed

(Argued March 14, 1907; decided April 16, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 23, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The following facts were found by the trial judge, or established without dispute: In March, 1885, one Emory D. Fuller became a member of a local lodge of the defendant, a domes-

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tic corporation organized as a "mutual benefit fraternity," and a certificate was issued to him by the grand lodge, entitling him "to all the rights and privileges of membership \* \* \* and to participate in the beneficiary fund of the Order to the amount of \$2,000, which sum at his death," as it was stipulated, was "to be paid to Ann Elizabeth Fuller, his wife." The certificate further stated that it was "issued upon the express condition that said Emory D. Fuller shall in every particular while a member of said Order comply with all the laws, rules and requirements thereof." In his application for membership Mr. Fuller agreed "to strictly comply with the constitution, laws and regulations which are, or may hereafter be enacted by the Supreme, Grand or Subordinate Lodge."

Among the questions in the application blank which the applicant was required to answer was the following: "Q. Profession and occupation? State precise nature of business;" to which he answered in writing: "Moulder." He also stated in the application that "compliance on my part with all the laws, regulations and requirements which are or may be hereafter enacted by said Order is the express condition upon which I am to be entitled to participate in the beneficiary fund and have and enjoy all the other benefits and privileges of the said Order."

In April, 1903, Mrs. Fuller, the first beneficiary, died and in September following "a new beneficiary was named and a certificate issued by which the \$2,000 was directed to be paid at the death of said Emory D. Fuller to Walter H. Ayers, the plaintiff herein." When Mr. Fuller joined the order there was no restriction as to business or occupation and any member might engage in selling liquor either by wholesale or retail. Between 1898 and 1902 the defendant adopted the following by-law: "Any member of the Order who shall, after March 1st, 1897, have entered, or who shall hereafter enter into the business or occupation of selling, by retail, intoxicating liquor as a beverage, shall stand suspended from any and all rights to participate in the beneficiary fund of the

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Order and his beneficiary certificate shall become nuli and void from and after the date of his so engaging in said occupation, and no action of the lodge of which he is a member or of the Grand Lodge or any officer thereof shall be necessary or a condition precedent to any such suspension. In case any assessment shall be received from a member who has thus engaged in such occupation after March 1st, 1897, the receipt thereof shall not continue the beneficiary certificate of such member in force, nor shall it be a waiver of his so engaging in such occupation."

Previous to January 1st, 1904, the said Fuller had never engaged in the business of selling liquor, but on that day in connection with one Hanchett, his copartner, he began to carry on a hotel at Weedsport, New York, and the firm employed a bartender, who sold intoxicating liquors for them in the usual way over the bar. Said hotel was conducted by the firm under licenses duly issued, pursuant to State and Federal statutes, from January 1st, 1904, to June 28th of the same year, when Mr. Fuller died. Proofs of death were made out in due form, but the defendant refused to pay the plaintiff said sum of \$2,000 or any part thereof, and now defends this action brought to recover the same on the ground that the insured ceased to be a member of the order by engaging in the business of selling intoxicating liquors at retail after the by-laws were so amended.

The trial court found as conclusions of law that Emory D. Fuller had vested rights in the certificate before the by-laws were amended; that when he joined the order he had a right to engage in the liquor traffic, and that said order, by a rule subsequently made, could not cut off that right which had become vested; that the defendant had the right to make reasonable by-laws, but said amendment, made without notice to the assured, was unreasonable, and, therefore, void as to him, that he was a member in good standing at the time of his death, and that the plaintiff was entitled to recover the amount claimed.

Upon appeal from the judgment entered upon this decision

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the Appellate Division affirmed, but not unanimously, on the authority of *Evans v. Southern Tier Masonic Relief Assn.* (182 N. Y. 453). The defendant appealed to this court.

*Isaac B. Barrett* for appellant. The decedent was subject to the amended law. (*Sabin v. Phinney*, 134 N. Y. 423; *Sanger v. Rothschild*, 123 N. Y. 577; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Lahey v. Lahey*, 174 N. Y. 146; *Shipman v. Protected Home Circle*, 174 N. Y. 398; *Niblock on M. B. Societies*, § 166; *Alexander v. Parker*, 144 Ill. 355; *R. C. B. Assn. v. Robinson*, 147 Ill. 138; *Holland v. Chosen Friends*, 54 N. J. L. 490; *Poultny v. Bachman*, 31 Hun, 49.) The law was reasonable and with notice to the decedent. (*Langnecker v. A. O. United Workmen*, 111 Wis. 279; *People ex rel. Goett v. A. O. United Workmen*, 32 Misc. Rep. 528; *Loeffler v. Modern Woodmen*, 100 Wis. 79; *Moeschbacher v. Supreme Court*, 180 Ill. 9; *Ellerbe v. Faust*, 119 Mo. 653; *Lawson v. Hewell*, 118 Cal. 613; *Gilmore v. Knights of Columbus*, 77 Conn. 58.) A member can contract that his certificate of membership shall depend on his doing or failing to do a specified act, and shall become void or reinstated on his doing or failing to do or perform such act. (*Atty.-Gen. v. N. A. L. Ins. Co.*, 82 N. Y. 172; *Roland v. M. R. F. L. Assn.*, 132 N. Y. 378; *Taylor v. Grand Lodge*, 75 Hun, 612; 148 N. Y. 751; *Ulmer v. Minister*, 37 N. Y. Supp. 679; *Teeter v. U. L. Ins. Assn.*, 159 N. Y. 411; *McGowan v. C. M. B. Assn.*, 76 Hun, 534; *Rood v. Benef. Assn.*, 31 Fed. Rep. 62; *Ellerbe v. Faust*, 119 Mo. 655.) The decedent had no vested right as to occupation. (*Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Sanger v. Rothschild*, 123 N. Y. 577; *Sabin v. Phinney*, 134 N. Y. 423; *Shipman v. Prot. H. C.*, 174 N. Y. 398; *Brown v. M. B. Assn.*, 33 Hun, 263; *Boasberg v. Cronan*, 30 N. Y. S. R. 483.)

*Seth S. Allen* for respondent. The decedent Fuller had vested rights in the contract which the defendant could not

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cut off by an amended by-law. (*Kent v. Q. S. M. Co.*, 78 N. Y. 159; *Deuble v. Grand Lodge*, 66 App. Div. 323; *Carter v. F. M. B. Assn.*, 3 Daly, 20; *Kelly v. Local Union*, 75 App. Div. 245; Bacon on Benefit Societies [3d ed.], § 85; *People v. Grand Lodge*, 156 N. Y. 537, *Thomas v. Thomas*, 131 N. Y. 205; *Matter of E. R. F. L. Assn.*, 131 N. Y. 369; *Wadsworth v. J. & T. Co.*, 132 N. Y. 540; *Shipman v. Protected Home Circle*, 174 N. Y. 423; *Evans v. M. R. Assn.*, 182 N. Y. 453.) The amendment is unreasonable, and, therefore, void, inasmuch as it provides for the expulsion of a member without notice. (Bacon on Benefit Societies [3d ed.], §§ 85, 168; *Watchel v. N. W. & O. Society*, 84 N. Y. 30; *People ex rel. Bartlett v. Medical Socy.*, 32 N. Y. 187; *Fritz v. Mack*, 62 How. Pr. 72; *Downing v. Columbia*, 10 Daly, 262; *People v. Musical Union*, 47 Hun, 273; *People v. H. T. Co.*, 14 N. Y. Supp. 76; *Yangen v. Krakawer*, 26 Misc. Rep. 332; *Smith v. Supreme Council*, 94 App. Div. 359; *Fargo v. Knights of Maccabees*, 96 App. Div. 495; *Bank v. Mudgett*, 44 N. Y. 519.)

VANN, J. This case cannot be distinguished in principle from a long line of cases decided by this court. (*Evans v. Masonic Relief Assoc.*, 182 N. Y. 453; *Beach v. Supreme Tent, Knights of Maccabees*, 177 N. Y. 100; *Langan v. Supreme Council, American Legion of Honor*, 174 N. Y. 266, 269; *Shipman v. Protected Home Circle*, Id. 398; *Weber v. Supreme Tent, Knights of Maccabees*, 172 N. Y. 490; *Deuble v. Grand Lodge, Ancient Order of United Workmen*, 66 App. Div. 323, 327; 172 N. Y. 665; *Parish v. New York Produce Exchange*, 169 N. Y. 48; *Engelhardt v. Fifth Ward P. D. S. & Loan Assoc.*, 148 N. Y. 281, 297; *Matthews v. Associated Press*, 136 N. Y. 333, 342; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.)

It is well established by these authorities "that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of members."

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An amendment of by-laws which form part of a contract is an amendment of the contract itself and when such a power is reserved in general terms the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation. (*Industrial & General Trust, Limited, v. Tod*, 180 N. Y. 215, 225.)

While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution. (Art. 1, § 10.)

The defendant promised by the contract which it made with the assured to pay to the beneficiary designated by him upon his death the sum of \$2,000. The obligation of that contract was not limited by the occupation of the assured, for in the absence of any restriction made by the parties he had an absolute right to engage in any lawful business that he might select. After this contract had been in force for more than twelve years and he had paid all the assessments as they became due and had complied with all the rules and regulations of the defendant, an attempt was made to restrict him in the choice of an avocation by amending the by-laws to that

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effect without his consent. When he had been insured for over nineteen years and had reached an age when other insurance could not be procured without a decided increase in cost, and perhaps not at all, he engaged in a new business requiring less strength and activity and died within a few months thereafter. He continued to pay his dues after he made the change, and, as the trial court expressly found, the duly authorized officer of the defendant knew when he received such dues that the insured "was engaged in the hotel business." The amended by-law, if enforced according to its terms, would deprive him of a right which he acquired by contract nearly twenty years before, and which he had preserved by paying to the defendant substantial sums of money every year during that period. The reservation of a general power to amend the by-laws, without reserving the specific right to so amend them as to restrict the occupation, did not permit an amendment in that respect, and the attempt made without the consent of the assured was beyond the power of the defendant and absolutely void as to him.

The effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right. It was an immediate right, open to enjoyment at all times during the existence of the contract, which the insured paid for when he joined the association, as well as every time he met an assessment. It was a natural right, of which he could not be deprived without his consent, and he never consented. It was a right which had pecuniary value, for it left the door open to change of employment by which more money could be made. The assured was not obliged to continue at manual labor all his life, but when he had acquired capital enough to go into business and employ others to work for him, he had the right to do so, and the right was obviously of such value as to constitute a vested right, within the meaning of that term as known to the law.

We think that the amendment as made was without effect

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upon the contract, and that the promise of the defendant to pay the sum of \$2,000 was in full force at the death of the assured. While a different rule prevails in some states, the law in the state where the defendant was organized does not permit, as to existing contracts, such an amendment of its by-laws as it now pleads to defeat this action.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, WERNER, WILLARD BAETLETT and HISCOCK, J. J., concur; CHASE, J., not sitting.

Judgment affirmed.

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JOSEPH BAMBACE, as Administrator of the Estate of FELICE BAMBACE, Deceased, Respondent, *v.* INTERURBAN STREET RAILWAY COMPANY, Appellant.

CONTRIBUTORY NEGLIGENCE. A refusal to charge in an action of negligence, that if the jury believed that decedent attempted to cross tracks five or six feet ahead of a horse car approaching at a speed of three miles an hour, its verdict must be for the defendant, constitutes reversible error.

*Bambace v. Interurban St. Ry. Co.*, 112 App. Div. 898, reversed.

(Argued April 8, 1907; decided April 16, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 18, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Charles F. Brown, Bayard H. Ames and Henry A. Robinson* for appellant. The exception of defendant to the refusal of the trial justice to charge its ninth request and to the modification thereof presents reversible error. (*Dambmann v. M. S. R. Co.*, 180 N. Y. 384; *Coleman v. S. A. R. Co.*, 114 N. Y. 612; *Meeker v. Smith*. 84 App. Div. 111;

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*McKinley v. M. S. R. Co.*, 77 App. Div. 256; *Davidson v. M. S. R. Co.*, 75 App. Div. 426; *Lyons v. Avis*, 5 App. Div. 196; *Curry v. R. R. Co.*, 99 Hun, 230; *Buscher v. N. Y. T. Co.*, 99 N. Y. Supp. 673; *Wilds v. H. R. Co.*, 24 N. Y. 442; *Owens v. H. R. Co.*, 35 N. Y. 516.)

*James C. Cropsey and F. W. Catlin* for respondent.

HAIGHT, J. This action was brought to recover the damages sustained by reason of the death of plaintiff's intestate, which was caused, as is alleged, by the negligence of the defendant.

The decedent was eleven years and four months old. On the 23d day of September, 1902, he was fatally injured by being run over by a horse car of the defendant near the crossing of Bleecker street on Carmine street in the city of New York. The testimony of the plaintiff's witnesses tended to show that the decedent attempted to cross the street from three to fifteen feet in front of the horses, which were proceeding at about three miles per hour and that as he attempted to cross, the driver whipped the horses, causing them to start up faster, and in doing so hit the decedent, causing him to fall and be run over by the front wheel of the car. There was a sharp conflict between the defendant's and plaintiff's witnesses; but for the purposes of the case we shall assume that the facts are as testified to by the plaintiff's witnesses. One of the plaintiff's witnesses testified that the decedent went upon the track three or four feet ahead of the horses. Thereupon, in submitting the case to the jury defendant's counsel requested the court to charge that "If you believe that the deceased ran or stepped on the track when the horses attached to the defendant's car were not more than five or six feet from him, as testified to by several of plaintiff's witnesses, then your verdict must be for the defendant." This request was refused by the court except as he had charged, and to such refusal an exception was taken. The court had previously charged that "if the jury find that the deceased ran or stepped upon the track

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of the approaching car when the horses attached thereto were no more than five or six feet distant from him and that a person exercising reasonable care for his own safety would not have done so in the same situation and under the same surrounding circumstances then the deceased was guilty in law of contributory negligence and the verdict should be for the defendant." It will be observed that the charge as made called for a determination on the part of the jury as to whether a person exercising reasonable care for his own safety would have done as this decedent did under the same circumstances, thus calling for a determination of fact as to what another person exercising reasonable care would have done under like circumstances. We, consequently, are of the opinion that the court had not charged, in substance, the request refused and that the question arises as to whether the defendant was entitled to have the jury instructed as requested. As we have seen, the plaintiff had submitted evidence tending to show that the decedent undertook to cross the tracks within less than five or six-feet ahead of the horses, and, consequently, the jury might have so found. If the defendant's car was proceeding at the speed of three miles per hour, only about one and one-third seconds could have elapsed before the horses would have reached the decedent. The time, therefore, within which the driver of the horses could have whipped them up and accelerated their speed was so short that the blow could scarcely have been delivered before the decedent was knocked down by the approaching horses.

We, therefore, are of the opinion that the defendant was entitled to the instruction asked for and that, if the jury had so found it would follow, as a matter of law, that the decedent was guilty of contributory negligence. For this reason the judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, VANN and HISCOCK, JJ., concur; CHASE, J., dissents.

Judgment reversed, etc.

GEORGE LEASK et al., as Executors of and Trustees under the Will of HUDSON HOAGLAND, Deceased, Respondents, *v.* GEORGE RICHARDS, JR., et al., Appellants, ANNA STRAIT et al., Appellants and Respondents, CLARENCE S. HOAGLAND, Respondent and Appellant, and MAHLON HOAGLAND et al., Respondents.

1. WILL—VALIDITY OF RESIDUARY CLAUSE. A provision in a will that the residuary estate be divided "among testator's nephews and nieces" in the proportions which "the respective gifts made to them herein bear to each other" is not void for uncertainty, when such proportion is not impossible of ascertainment.

2. DETERMINATION OF THE PROPORTION OF RESIDUE. The earlier clauses of the will having given to the nephews and nieces (1) specific bequests of a specified amount; (2) bequests of a specified amount in trust with income to a life tenant, with remainder to such life tenant's children; (3) bequests in trust to those having no children, the principal upon the death of the life tenant to revert to the residuary estate, the principal of each trust created should be taken as the sum given upon which the amount of the proportion of the residue should be determined.

3. WHEN GRANDNEPHEWS INCLUDED AMONG NEPHEWS. Where the intention of the testator is evident, his grandnephews and grandnieces may be included among the nephews and nieces entitled to share in the residuary estate.

*Leask v. Richards*, 116 App. Div. 274, affirmed.

(Argued March 8, 1907; decided April 16, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 13, 1906, which modified and affirmed as modified a judgment of Special Term construing the will of Hudson Hoagland, deceased.

The facts, so far as material, are stated in the opinion.

*Richard M. Martin* and *Frank M. Tichenor* for George Richards, Jr., appellant. If this court decides that the only interpretation possible is that the various legatees should receive from the residue gifts of the same kind and nature as their specific gifts, the "Thirtieth" clause must fail, as clearly

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there would be as to part unlawful suspension of the power of alienation, or, rather, failure of all future estates to vest within two lives in being. (*Tilden v. Green*, 130 N. Y. 29; *Herzog v. T. G. & T. Co.*, 177 N. Y. 92.)

*J. Elmer Melick* and *George C. De Lacy* for Thomas H. Hoagland, appellant. In construing the thirtieth clause of the will the testator's intention must control. (*Covenhoven v. Shuler*, 2 Paige, 122; *Crosby v. Wendell*, 6 Paige, 548; *Pond v. Bergh*, 10 Paige, 140; *Heard v. Case*, 23 How. Pr. 546; *Sutherland v. Clark*, 61 How. Pr. 310; *McKeon v. Kearney*, 57 How. Pr. 349; *Hawn v. Banks*, 4 Edw. Ch. 664; *McDonald v. Walgrave*, 1 Sandf. 274; *Howland v. U. T. Seminary*, 5 N. Y. 193; *Scott v. Guernsey*, 48 N. Y. 106.) It is obvious from the other clauses of his will, as well as from the thirtieth clause, that the testator intended that his residuary estate should be divided among such of his living "nephews and nieces" as he had previously remembered in his will. It is likewise obvious from the whole will that the testator did not intend to include his grandnephews and grandnieces in the term "nephews and nieces," and thus permit them also to participate in his residuary estate. (*Matter of Woodward*, 117 N. Y. 522; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Shelby v. Bryer*, Jac. 207; *Falkner v. Butler*, 1 Amb. 514; *Crook v. Whitley*, 7 De G., M. & G. 490; *Waring v. Lea*, 8 Beav. 247; *Low v. Harmony*, 72 N. Y. 408; *Matter of Robinson*, 57 Hun, 395; *Matter of Goble*, 30 N. Y. S. R. 944; *Sanson v. Bushnell*, 25 Misc. Rep. 268.) The testator's residuary estate is by his own explicit and positive direction to be divided between his nephews and nieces "in the proportions which the respective gifts made to them herein bear to each other." To divide the residuary estate between them in any other proportions is to make a new will for the testator contrary to his expressed intentions. (*Trask v. Sturges*, 170 N. Y. 482; *Crosby v. Wendell*, 6 Paige, 548; *Keteltas v. Keteltas*, 72 N. Y. 312; *Roe v. Vingut*, 117 N. Y. 204; *Matter of Wood-*

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*ward*, 117 N. Y. 522.) The method of distribution adopted by the Special Term carries out the testator's intentions as expressed in the thirtieth clause, is both just and equitable and should be sustained as the only true criterion of proportionate distribution in this case. (*Jackson v. Edwards*, 7 Paige, 404; *Schell v. Plumb*, 55 N. Y. 592; *Hollis v. D. D. Seminary*, 95 N. Y. 166; *Sauter v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 50, 54; *People v. S. L. Ins. & Annuity Co.*, 78 N. Y. 114; *Doty v. Baker*, 11 Hun, 222; *Smart v. Haring*, 14 Hun, 276; *Davis v. Standish*, 26 Hun, 608; *Steele v. Ward*, 30 Hun, 555; *Matter of Brooklyn Bridge*, 75 Hun, 558.)

*George W. Schurman* for Edwin R. Hurd, appellant. The thirtieth clause of the will is void for uncertainty. (Redf. Surr. Pr. [6th ed.] § 258; 2 Underhill on Wills, 1385, 1386; *Matter of Logan*, 131 N. Y. 461; *Tilden v. Green*, 130 N. Y. 29; *Herzog v. T. G. & T. Co.*, 177 N. Y. 86; *Van Nostrand v. Moore*, 52 N. Y. 12; *Schult v. Moll*, 132 N. Y. 122; *Clark v. Camman*, 160 N. Y. 315; *Jones v. Hand*, 78 App. Div. 56; *Mee v. Gordon*, 104 App. Div. 520; *Weeks v. Cornwell*, 104 N. Y. 325.) Edwin R. Hurd is included among the "nephews and nieces" referred to in the thirtieth clause of the testator's will. (*Conner v. Conner*, 6 App. Div. 594; 155 N. Y. 627.)

*Charles F. Darlington* and *John S. Jenkins* for Frank H. Belknap et al., appellants. The thirtieth clause of the will is void for indefiniteness and uncertainty. (*Weeks v. Cornwell*, 104 N. Y. 325; *Kalish v. Kalish*, 166 N. Y. 378; *Jackson v. Elmendorf*, 3 Wend. 222; *Tilden v. Green*, 130 N. Y. 29; *Jackson v. Edwards*, 7 Paige, 393; *Matter of Logan*, 131 N. Y. 456; *Van Nostrand v. Moore*, 52 N. Y. 18; *Dun-gamon v. Smith*, 12 Cl. & Fin. 599; *Matter of Bowers*, 113 N. Y. 571.) The grandnephews and grandnieces who received legacies are entitled to share in the residuary estate. (*Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brower v. Bowers*,

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1 Abb. Ct. App. Dec. 14; *Bowne v. Underhill*, 6 T. & C. 344; *Prowitt v. Rodman*, 37 N. Y. 42; *Low v. Harmony*, 72 N. Y. 408; *Gelston v. Shields*, 78 N. Y. 275; *Sholl v. Sholl*, 5 Barb. 312.)

*George Clinton* for Whitfield H. Hoagland, appellant. The decision of the Appellate Division that, under the residuary clause the proportion to be distributed should be reckoned upon the basis of the amounts of the gifts made by the testator, and not upon the values, is correct and the contrary decision of the trial court is erroneous. (*Weeks v. Cornwell*, 104 N. Y. 325.) The Appellate Division and the trial court committed no error in holding that the residuary clause of the will is valid. (*Weeks v. Cornwell*, 104 N. Y. 325.) The Appellate Division erred in holding that the expression "nephews and nieces" as used in the residuary clause, includes "grandnephews and grandnieces" and the decision of the trial court that the residuary clause did not carry beyond nephews and nieces is correct. (*Cromer v. Pinckney*, 3 Barb. Ch. 466; *Matter of Woodward*, 117 N. Y. 522.)

*Paul L. Kiernan* for Fannie Swayne et al., appellants. The testator intended, in his use of the words "nephews and nieces," to mean nephews and nieces' families; that is, to include grandnephews and grandnieces and great grandnephews and great grandnieces. The distribution of the residuary estate was to be made on the basis of the value of the individual interests of legatees. (*Roe v. Vingut*, 117 N. Y. 212; *Smith v. Bell*, 31 U. S. 75; *Weeks v. Cornwell*, 104 N. Y. 343.)

*Thomas E. Boyd* for Charles F. Hoagland, appellant. Testator used the words "nephews and nieces" in their ordinary sense and definitely pointed out and named the residuary legatees. (*Matter of Woodward*, 117 N. Y. 522; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214.)

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*William H. Hamilton, Samuel W. Bowen and Richard J. Kent* for Anna C. Tucker et al., appellants. The children of Mary Benjamin are entitled under the will to such share in the residuary estate as their mother would take if living. (*Marsh v. Hague*, 1 Edw. Ch. 172; *Matter of Vowers*, 113 N. Y. 569; *Matter of Jewett*, 5 Misc. Rep. 557.)

*Edgar J. Nathan* for Annie Strait et al., appellants and respondents. It was error to reverse the Special Term conclusion and to hold that the language of the residuary clause included grandnephews and grandnieces. (*Matter of Woodward*, 117 N. Y. 522; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Buzby v. Roberts*, 53 N. J. Eq. 566; *Lewis v. Fisher*, 2 Yeates, 196; *Brower v. Bowers*, 3 Abb. Ct. App. Dec. 214; *Shepard v. Shepard*, 57 Conn. 24; *Prowitt v. Rodman*, 47 N. Y. 42; *Bowne v. Underhill*, 6 T. & C. 344; *Low v. Harmony*, 72 N. Y. 408; *Matter of Logan*, 131 N. Y. 456.) The Appellate Division properly held that the trust legacies should be treated as sums given outright in determining the proportions in which nieces should share in the residuary estate. (*Weeks v. Cornwell*, 104 N. Y. 325; *Matter of Thompson*, 5 Dem. 393; *Tichenor v. Tichenor*, 41 N. J. Eq. 39; *Budd v. Budd*, 59 Fed. Rep. 735.)

*T. S. Ormiston* for Cornelia C. Rose, appellant and respondent. The residuary estate should be ordered to be distributed among the nephews and nieces, not including therein any grandnephews or grandnieces, in the proportions the principal sums of money in the will of Hudson Hoagland given to or set aside for the said nephews and nieces respectively bear to each other. (*Matter of Woodward*, 117 N. Y. 522; *Weeks v. Cornwell*, 104 N. Y. 325; *Meyer v. Cohen*, 111 N. Y. 276; *Johnson v. S. G. & L. Co.*, 146 N. Y. 160.)

*Frank L. Holt* for Clarence S. Hoagland, respondent and appellant. If it is held that the thirtieth clause is valid and

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that a division of the residuary estate thereunder is practicable, then this defendant contends that as a part of any scheme of distribution, the testator intended that grandnephews and grandnieces who receive legacies, and whose parents are dead, should share in such distribution. (*Weeds v. Bristow*, L. R. [2 Eq.] 333; *De Kay v. Irving*, 5 Den. 646; 9 Paige, 521; *Burtis v. Doughty*, 3 Bradf. 287; *Sherwood v. Sherwood*, 3 Bradf. 230; *Lytle v. Beveridge*, 58 N. Y. 592; *Lawton v. Corlies*, 127 N. Y. 100; *Hillen v. Iselin*, 144 N. Y. 365; *Grant v. Grant*, L. R. [5 C. P.] 727.) Notwithstanding the rational plan contained in the prior portion of the will and the fact that the Appellate Division has correctly determined the persons entitled to share in the residuary estate, the thirtieth clause having survived from earlier wills of which it may have formed an intelligible part, does not accord with the prior provisions of the present will, and the proportionate amounts to be distributed thereunder cannot be determined; it, therefore, cannot be given effect in connection with such prior provisions and is void. (*Tilden v. Green*, 130 N. Y. 51; *Coster v. Lorillard*, 14 Wend. 350; *Fargo v. Squires*, 6 App. Div. 491; *Weeks v. Cornwell*, 104 N. Y. 336; *Matter of Logan*, 131 N. Y. 456; *Van Nostrand v. Moore*, 52 N. Y. 18; *Dungannon v. Smith*, 12 Cl. & Fin. 599.)

*J. Hampden Dougherty* for plaintiffs, respondents. In construing the residuary clause the Special Term held that, in order to carry out the testator's intention, as expressed in said clause, the value, at the time of his decease, of his gifts to nephews and nieces, should be ascertained and determined according to the mortality tables. This is both a reasonable and lawful construction. (*Schell v. Plumb*, 55 N. Y. 592; *Jackson v. Edwards*, 7 Paige, 408; *Hollis v. D. T. Seminary*, 95 N. Y. 166; *People v. S. L. Ins. Co.*, 7 Abb. [N. C.] 198; 78 N. Y. 114; *Ferry Boat D. F. Greyory*, 2 Ben. [U. S.] 239; *Empie v. Empie*, 35 App. Div. 55.) The testator intended to give outright to each nephew and niece to or for whom he had theretofore made a bequest, whether of an abso-

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lute legacy or a trust fund, a corresponding fraction of his residuary estate. (*Weeks v. Cornwell*, 104 N. Y. 325.) The words "nephews and nieces," in the residuary clause, are to be taken in their primary and ordinary signification. They do not include grandnephews and grandnieces, whether the parents of such grandnephews or grandnieces be living or dead. (*Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214; 2 Jarman on Wills, 1006; *Matter of Woodward*, 117 N. Y. 522; *James v. Smith*, 14 Sim. 214; *Shepard v. Shepard*, 57 Conn. 24; *Shull v. Johnson*, 55 N. C. 202; *Buzby v. Roberts*, 53 N. J. Eq. 566; *Lewis v. Fisher*, 2 Yeates, 196.)

*James Gillin, Jr.*; for Ella D. Garside et al., respondents. It was the evident intention of the testator, as disclosed by his whole will, to divide his residuary estate among his living nephews and nieces and the children of his deceased nephews and nieces in the proportions which the respective gifts made to them in the prior clauses of the will bear to each other. (1 Jarman on Wills, 356; *Drake v. Pell*, 3 Edw. Ch. 251; *Pond v. Bergh*, 10 Paige, 140; *Terry v. Wiggins*, 47 N. Y. 512; *Starr v. Starr*, 132 N. Y. 154; *Roe v. Vingut*, 117 N. Y. 204.) The circumstances surrounding the bequest to Mary Benjamin in the ninth clause of the will show that it was the evident intention of the testator, in and by the thirtieth clause of his will, to divide his residuary estate among his living nephews and nieces and the children of his deceased nephews and nieces in the proportions which the respective gifts made to them in the prior clauses of the will bear to each other. (*Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214; *Shepard v. Shepard*, 57 Conn. 24; *Weeds v. Bristow*, L. R. [2 Eq.] 333.) The thirtieth clause of the will under consideration is valid and operative. (*Weeks v. Cornwell*, 104 N. Y. 325.)

*Randall H. Ludlow* for Laura B. Hurd, respondent. It was the intention of the testator, appearing from the will and

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surrounding circumstances, to include grandnephews and grandnieces who represented the families of deceased nephews and nieces under the term "nephews and nieces" in the thirtieth clause of the will. (*Scott v. Guernsey*, 48 N. Y. 106.) It was the intention of the testator to apportion among the beneficiaries who are entitled to the residuary estate their respective shares in proportion to the gifts hereinbefore received, the said beneficiaries to receive their proportions absolutely. (*Arcularius v. Sweet*, 25 Barb. 403; *Arcularius v. Geisenhauer*, 3 Bradf. 64; *Weeks v. Cornwell*, 104 N. Y. 325; *Hard v. Ashley*, 117 N. Y. 106.)

*Tracy C. Becker* for Marguerite G. Hoagland, respondent. The thirtieth clause includes all nephews and nieces who have already been given any definite share in the estate and excludes all others from participation in the residue as grandnephews and grandnieces. (*Matter of Woodward*, 117 N. Y. 522.)

HAIGHT, J. This action was brought to obtain a construction of the last will and testament and codicil of Hudson Hoagland, who died on the 30th day of January, 1904.

The testator was a widower and left no children or descendants. He left him surviving one brother and sixteen nephews and nieces and several grandnephews and grandnieces. Many of the nephews and nieces had married and had children, and some had died leaving children. The will contains bequests in favor of all of his nephews and nieces, with the sole exception of his nephew Edwin R. Hurd, who is said to have moved west upwards of fifty years ago, but the will contains a legacy to his daughter. It also contains legacies to a number of grandnephews and grandnieces, children of deceased nephews and nieces, and after making provisions for the surviving brother, and various other persons not necessary to be here considered, provides in the thirtieth clause as follows: "All the rest, residue and remainder of my estate and property, that is to say, all not hereinbefore disposed of, I give, devise

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and bequeath to my nephews and nieces, to be divided between them in the proportions which the respective gifts made to them herein bear to each other." It is said that there will be upwards of \$1,000,000 distributed under this clause.

It is contended on behalf of Edwin R. Hurd, the testator's nephew who was not reremembered in the will, that the residuary clause is void for uncertainty, for the reason that the "respective gifts" to nephews and nieces contained in other clauses of the will are of such a character that it is impossible to ascertain their amount. The clause referred to is very simple in its phraseology, is quite often found in wills, and is so specific and clear in its meaning as to leave little, if any, doubt with reference to the meaning of the testator so far as this question is concerned. It is quite true that a question has arisen with reference to the proportion that each nephew and niece shall take of the residuary estate, but this involves only a question of construction and the proportion is not impossible of ascertainment. We, therefore, conclude that the clause is not void, and that the testator did not die intestate as to his residuary estate.

The bequest to each nephew and niece varies in amount, which, for the purpose of the question now to be discussed, we will divide into three classes. *First*, a direct bequest of a specified sum. *Second*, a bequest to the executors in trust of a specified sum, the income to be paid to a designated nephew or niece during life, and upon the death of the life tenant the principal is bequeathed to such life tenant's children. *Third*, a bequest in trust to the executors of a specified sum, the income to be paid to the life tenant specified, and upon the death of such life tenant the principal to revert to the residuary estate.

It is contended that the nephews and nieces to whom the income of a specified sum has been given during life, are entitled only to the proportion of the residuary estate which the present value of their life estate bears to the amount given to the other nephews and nieces. We do not think that such was the intention of the testator. The words of the residuary

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clause import an absolute gift of that portion of the residuary estate which the gifts made to the nephews and nieces bear to each other; and in determining the amount of the gifts so made to the nephews and nieces, we incline to the view that the principal of each trust created should be taken as the sum given upon which the amount of the proportion of the residue should be determined. *First*, we have specific bequests of a specified amount. *Second*, we have bequests of a specified amount in trust with income to a life tenant, with remainder to such life tenant's children. Here we have a vested remainder in the children of the life tenant which finally disposes of the principal fund set apart in trust. There is, therefore, no apparent reason why such nephew or niece having a family should not be placed on the same footing as to proportion in the residuary estate as a nephew or niece having no children who has been given a specified sum absolutely. The third class of cases pertains to those for whose benefit a trust has been created who have no children to take as remaindermen, and the principal upon the death of the life tenant reverts to the residuary estate. But we think no exception was intended to be made as to those beneficiaries, in so far as their right to share in the residuary estate is concerned. The other nephews and nieces in effect become their remaindermen and their rights should be determined on the basis of the principal set apart for their use, in accordance with the rule adopted by this court in the somewhat analogous case of *Weeks v. Cornwall* (104 N. Y. 325).

The remaining question to be determined is as to whether the grandnephews and grandnieces of the testator, children of deceased nephews and nieces to whom bequests have been made in the will, should also be included among the nephews and nieces entitled to share in the residuary estate. This is purely a question of construction depending upon the intent of the testator. We entertain the view that the testator intended to include them, and upon this point we adopt the argument of Justice SCOTT as expressed in the prevailing opinion below.

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The judgment should be affirmed, with costs to the parties appearing in this court by attorney and filing briefs, payable out of the fund.

CULLEN, Ch. T., GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT, Hiscock and CHASE, JJ., concur.

Judgment affirmed.

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ALEXANDER F. ROBERTSON et al., as Trustees under the Will of JOHN T. FARISH, Deceased, Plaintiff, v. MARTHA G. DE BRULATOUR, Individually, Respondent and Appellant, and THOMAS H. SOMERVILLE et al., Appellants and Respondents.

1. TRUST—DIVIDENDS, CASH OR STOCK, REPRESENTING PROFITS AND NOT CAPITAL, GO TO LIFE BENEFICIARY. Where a testamentary trust of specific securities is created, with a direction that "the income and profits thereof" be paid to a beneficiary for life, with a bequest over of such securities at the termination of the life estate, extraordinary distributions or dividends, representing accumulated income and profits and not capital, go to the life tenant; and in determining this question the terms used by the corporation in declaring the distribution, as in this case from its "cash surplus," or its methods of bookkeeping are not conclusive; if an examination of the facts establishes that the amount distributed does not intrench upon the capital, but was from a surplus of corporate earnings and income, unaffected by proceeds of sales of real estate forming a part of the company's capital, the life tenant is entitled thereto.

2. STOCKHOLDERS HAVE NO RIGHT TO PROFITS UNTIL DECLARATION OF DIVIDEND. The earnings of a corporation remain its property until a division is made or a dividend declared. Until that time whatever interest a stockholder has therein passes with a transfer of his stock as an incident thereto. Where, therefore, such stock becomes a part of the *corpus* of the trust, dividends thereafter declared are like all other income of the trust fund and belong to the life tenant. Various transactions in testator's lifetime, claimed to have created obligations of the corporation to stockholders, examined, and held that such obligations were not created until the distribution of stock and cash was actually declared.

3. PROCEEDS OF SUBSCRIPTION RIGHTS ATTACHED TO TRUST SECURITIES GO TO REMAINDERMEN. New shares of stock purchased by the trustees in the exercise of the right attached to the trust securities to subscribe therefor, and sums of money received from the sale of such subscription rights, become capital and the life tenant is not entitled thereto.

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4. WHEN TRUSTEES NOT OBLIGED TO MAINTAIN SINKING FUND. The rule that trustees must maintain a sinking fund, with which to make good any depreciation in the value of the securities by the falling off in premiums, has no application where such securities have been specifically bequeathed.

5. TRUSTEES' COMMISSIONS—CODE CIV. PRO. § 3320. Trustees are entitled to commissions for receiving and paying out all sums of principal, including the value of the securities forming a part of the *corpus*.

6. BENEFICIARY MAY ACT AS TRUSTEE The life beneficiary may act as trustee with others in the management of the trust, and is entitled to the same commissions as her co-trustees upon the *corpus* of the trust.

*Robertson v. de Brulatour*, 111 App. Div. 882, affirmed.

(Argued March 7, 1907; decided April 16, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 28, 1906, which modified and affirmed as modified a judgment entered upon the report of a referee in an action for an accounting.

The facts, so far as material, are stated in the opinion.

*George F. Canfield* and *Kenneth K. MacKenzie* for Thomas H. Somerville et al., appellants and respondents. Money obtained from the sale of real estate by a corporation previously used by the company for its business purposes, when distributed by the company, represents a distribution of *corpus*, and does not go to a life tenant of a trust holding stock of the company. (*Matter of Rogers*, 161 N. Y. 108; *Chester v. B. C. Mfg. Co.*, 70 App. Div. 443; *Riggs v. Cragg*, 26 Hun, 89; *Matter of Kernochan*, 104 N. Y. 618; *Matter of Curtis*, 29 N. Y. S. R. 217; *Hitte v. Hitte*, 93 Ky. 257; *Vinton's Appeal*, 99 Penn. St. 434; *Heard v. Eldredge*, 109 Mass. 258; *Gifford v. Thompson*, 115 Mass. 478; *Wheeler v. Perry*, 18 N. H. 307.) The fact that after the distribution of the \$2,500,000 the assets of the New York and Harlem railroad were more than equal to the par value of its outstanding stocks and bonds is not material in determining whether this distribution is capital or income. (*Matter of Rogers*, 161 N. Y. 108; *Chester v. B. C. Co.*, 70 App. Div. 443; *Stewart*

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v. *Phelps*, 71 App. Div. 91; 173 N. Y. 621; *Hitte v. Hitte*, 93 Ky. 257.) Section 3320 of the Code does not authorize the payment of commissions to trustees on anything but money. (Code Civ. Pro. §§ 2730, 2802; *Chisholm v. Hamersley*, 114 App. Div. 565.) Mrs. de Brulatour being the sole beneficiary of the trust, is not entitled to act as trustee, and, therefore, is not entitled to commissions. (*Bundy v. Bundy*, 38 N. Y. 420; *Rogers v. Rogers*, 111 N. Y. 228; *Woodward v. James*, 115 N. Y. 346; *Greene v. Greene*, 125 N. Y. 506; *Woodbridge v. Bockes*, 170 N. Y. 596; *Matter of Shipman*, 53 Hun, 511; *Postly v. Cheyne*, 4 Dem. 492; *Matter of Hitchins*, 39 Misc. Rep. 767; *Hoffman House v. Foote*, 172 N. Y. 348; *People ex rel. v. Donohue*, 70 Hun, 317.) A person beneficially interested in a trust is not allowed commissions for acting as trustee of such trust. (*Blunt v. Syms*, 40 Hun, 566; *White v. Rankin*, 18 App. Div. 293; *Kahn v. Lichtenstein*, 28 App. Div. 211; *Matter of Hitchins*, 39 Misc. Rep. 767; *Miles v. Bacon*, 4 J. J. Marsh. [Ky.] 457; *Reiff's Appeal*, 124 Penn. St. 145; *P. S. Co. v. Yandes*, 139 Ind. 307; *White v. Rankin*, 18 App. Div. 293; *Imboden v. Hunter*, 23 Ark. 622.)

*Henry de Forest Baldwin* and *Herbert C. Lakin* for *Martha G. de Brulatour*, respondent and appellant. The intention of the testator was that his widow should receive all the income and profits of every description from the trust. (*Matter of Rogers*, 22 App. Div. 428; *Matter of James*, 146 N. Y. 78.) The sum of \$31,250, received by the trustees upon the distribution of surplus by the New York and Harlem Railroad Company, is income, and should be paid to the life tenant. (*Matter of Kernochan*, 104 N. Y. 618; *McLouth v. Hunt*, 154 N. Y. 179; *Matter of Rogers*, 161 N. Y. 108; *Lowry v. F. L. & T. Co.*, 172 N. Y. 137; *Chester v. B. C. Mfg. Co.*, 70 App. Div. 443; 183 N. Y. 425; *Stewart v. Phelps*, 71 App. Div. 91; *Hemenway v. Hemenway*, 181 Mass. 406; *Matter of Stevens*, 46 Misc. Rep. 623.) The trustees are entitled to one-half commissions for receiving the

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entire capital of the trust estate. (*Johnson v. Lawrence*, 95 N. Y. 154; *Matter of Garth*, 10 App. Div. 100; *Matter of Fisher*, 93 App. Div. 186; *Matter of Whipple*, 81 App. Div. 589; *Schenck v. Dart*, 22 N. Y. 420.) Madame de Brulatour is entitled to act as trustee. (*Amory v. Lord*, 9 N. Y. 403; *Rogers v. Rogers*, 111 N. Y. 228; *Bull v. Odell*, 19 App. Div. 605.)

*Edward T. McLaughlin* for Glassel Stringfellow et al., appellants and respondents.

GRAY, J. The plaintiffs, as trustees under the will of John T. Farish, who died in 1891, brought this action for an accounting and to have determined thereby questions, which have arisen upon conflicting claims of the *cestui que trust* and of the remaindermen to moneys and securities distributed by corporations, whose stocks formed part of the capital of the trust fund, and questions relating to the trustees' right to commissions upon the *corpus* of the trust and to their management thereof. The sixth clause of the will provides for the trust in the following language:

"Sixth: I give and bequeath to Charles M. Fry, Alexander E. Robertson and my wife Martha G. Farish, and the survivors and the survivor of them and to the successor or successors of such survivor Twenty-five hundred (2,500) shares of the capital stock of the New York and Harlem Railroad Company, One thousand (1,000) shares of the capital stock of the New York Central and Hudson River Railroad Company (consolidated), and One thousand (1,000) shares of the capital stock of the Chicago, Rock Island and Pacific Railway Company, also Twenty thousand dollars (\$20,000) at the par value of the consolidated bonds of the Erie and Pittsburg Railroad Company, Fifty thousand dollars (\$50,000) at the par value of the consolidated bonds of the Chicago and Northwestern Railway Company and Thirty thousand dollars (\$30,000) at the par value of the first mortgage bonds of the Louisiana and Missouri River Railroad Company together with all interest accrued on and above described bonds at the time of my death and all

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interest accruing thereon thereafter and also every and all dividends which may be declared on the above described stocks subsequent to my death, in trust, nevertheless, to receive the income and profits thereof and apply the same to the use of my said wife Martha G. Farish, during the term of her natural life. \* \* \* [Here follows a power to sell and to reinvest.]

"Upon the death of my said wife I give and bequeath all of the above mentioned shares of stock and bonds, or the proceeds of such as shall have been previously sold, to such persons as would have inherited the same under the laws of the State of New York, if the same were real estate and I had died intestate and unmarried, at the same time as my wife, and in such proportions as they would have inherited the same respectively."

The testator left no children, or descendants, and his residuary estate was given to his heirs-at-law. The testator's widow remarried and is now Madame de Brulatour. She and Mr. Robertson are the survivors of the three trustees named. There has been no difficulty in the past upon their accountings and that which now arises presents legal questions of interest and of importance; especially, with respect to the proper disposition by the trustees of distributions, or dividends, made by certain corporations upon their capital stock. The right to them, as between the beneficiary of the trust and the remaindermen, will depend, primarily, upon the testator's intention, as it may be gathered from the will, and, then, if that is deemed to be expressed ambiguously or indefinitely, upon the subject, resort must be had to the facts, in order to discover whether the particular dividend was a distribution by the corporation of accumulated earnings and profits, or of that which was capital. There can be no doubt but that the testator has employed rather unusual language in making the trust provision for his wife and, in my opinion, it is such as, by a fair and reasonable reading, would give to his widow, as the beneficiary, everything which is distributed to the trustees, as the legal holders, upon the shares of stock

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included in the trust; irrespective of all consideration of the origin of that which is distributed.

But, while I entertain the opinion that the trust clause of this will is comprehensive enough to include the extraordinary dividends, or distributions, in question, however they may be termed, which were made by the New York & Harlem Railroad Company and by the Chicago, Rock Island and Pacific Railroad Company, I prefer to place our decision, in that respect, upon the ground that their distributions were of income and profits, and not of capital.

The New York & Harlem Railroad Company's distribution was made in September, 1899, pursuant to a resolution of the board of directors. It read :

"Whereas it appears from the treasurer's report that the company's cash surplus now amounts to upwards of \$2,500,000 over and above all claims and obligations existing and contingent, and that the same is now available for distribution among the stockholders; It is Further Resolved that the sum of \$2,500,000 of the said surplus be distributed at the rate of \$12.50 per share to all stockholders of record at close of business on the 23rd day of September, 1899, and that the treasurer be and he is hereby authorized and directed to make such payment on the 2nd day of October next." The word dividend is not used; but that is quite immaterial, if the facts disclose the origin of this "surplus" and enable us to ascertain that "income and profits" were the subject of distribution. The findings are explicit enough upon this head. At the time that the resolution was passed, the company's books showed on the credit side of the profit and loss account a surplus of \$3,096,705.84. The contention of the remaindermen was, in effect, and the referee so held below, that the \$2,500,000 distributed by the directors represented the proceeds of sales of portions of the company's real estate; which, by reason of certain leases of its railways, more particularly referred to hereafter, had become useless. Being the proceeds of the sale of a "portion of the abandoned plant of the company, theretofore used in its business," as they say, the

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distribution was of the *corpus* of the company's property and was a return of capital. The facts do not justify the contention and it is based on a fallacy, in the assumption that, because the sale of real estate had put the company in the possession of sufficient cash, the distribution, necessarily, was of the real estate as converted. But that is not the fact. The surplus item in the profit and loss account did not arise from, nor had it any relation to, these sales. The result of the sales was to increase the cash balance and, undoubtedly, the cash proceeds were used in the distribution of the company's surplus among the stockholders, as was the finding of the referee; but that was a mere matter of bookkeeping, as will be explained later. The essential is that the sales did not create the surplus, nor affect it as an item in the account of assets and liabilities, and such are the findings. The surplus shown by the company's ledger represented the difference between assets and liabilities, as carried in the profit and loss account, and how it arose is readily ascertainable from the accounts of the company's transactions. In 1873, the company leased its steam lines and real estate appurtenant thereto to the New York Central & Hudson River Railroad Company for 401 years, at a rental measured by payments of eight per cent on its capital stock and of the interest on its bonds. In 1896, it leased its horse-car line on Fourth and Madison avenues to the Metropolitan Street Railway Company for 999 years, at a rental measured by payments on the former's capital stock, which would amount, in a few years, to four per cent. As the result of these leases, the company, while still a going concern, ceased to operate its railways. It owned, in addition to the great terminal station at 42nd street, other, and unneeded, parcels of real estate; which had been formerly used, either, for a station, when the terminal had been below 42nd street, or for its street-car stables and other similar corporate purposes. Some of these properties had not been included in the leases. One of them was the block, between Fourth and Madison avenues, 26th and 27th streets, now occupied by the "Madison Square Garden," and which had been the principal

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railroad station before the building of the "Grand Central" depot; another was an unimproved block between Fourth and Lexington avenues, 34th and 33rd streets; another was the block at Fourth avenue and 32d street, used for street-car stables, and another was a plot at Madison avenue and 85th street, also, used for the same purposes. Between 1886 and 1899 these four properties were sold at a large profit. In the company's ledger was kept an account known as "Real Estate in New York, City," and, as sales were made, the proceeds were, wholly, credited to that account; with the result, of course, that, to the extent of the credits, the charge to the account was reduced. The profits of the transactions went to reduce the carrying cost upon the books of the other real estate. The moneys were charged to cash in "temporary assets" and the result of the bookkeeping was that the charge against real estate became lessened, until the value, on the books, of the company's New York city real estate was written off at \$478,376.81. If the profits upon the transactions of sale had been regarded as creating a surplus of assets, they would not have been credited in the real estate account. In that case, only the cost of the real estate sold would have been credited and the item of surplus would have been increased to the extent of the clear profit; but that item never reflected the profit on sales. The account with the real estate reflected the condition of the company's real estate as an asset and it would seem quite plain that this method of bookkeeping, by which the proceeds of sales of real estate were carried as a credit to the real estate account, actually, increased the value of the capital stock by the amount that the clear value of the real estate in possession was increased.

This is shown by the findings of fact, which must negative any inference that the subject of distribution by the resolution of September, 1899, was the proceeds of the real estate sales. It is found that "the Profit and Loss account on the company's books and the company's surplus account on its books were practically unchanged and unaffected by the

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aforesaid sales of real estate. \* \* \* When the above mentioned properties were sold, the purchase price thereof was credited to the 'Real Estate in New York City' account and charged to cash, but without affecting on the books the balance of surplus in the Profit and Loss account. After said sales the 'Real Estate in New York City' account was carried at \$478,376.81, at which figure it stood in September, 1899. Said Profit and Loss account included both earnings and income and not necessarily any profits from the sale of real estate owned by the Company."

The only surplus, which the books showed to the directors as held by the company, was its profit and loss account. That, as already mentioned, amounted at the time to \$3,096,705.84. In 1873, at the time of the making of the first lease, it amounted to \$1,611,347.63, and we are informed, by the findings, that from that date it did not fall below that figure, "but increased from year to year up to September 30th, 1899, when it amounted to \$3,096,705.84." We are, further, informed how this gradual increase was possible. Beyond the rentals from its lessees, the company was in receipt of "some interest and dividends on investments" and "it has not required any cash capital for the purpose of carrying on its business." Now the total increase in the surplus in the twenty-six years from 1873 was less than \$1,500,000, or at the rate of only about \$57,000, a year. In view of the finding that the profit and loss account included the corporate earnings and income and that the surplus item in that account was unaffected by the real estate sales, but the one conclusion is permissible, that the surplus, or increase in the surplus, arose from the excess of the company's revenues, remaining after the payment of the annual dividends. That item in the account would have been just the same, if there had been no sales; but, to the extent that sales were made of real estate and of securities, (and there were sales of the latter), assets were liberated and the cash accumulations created a cash surplus, which the directors could, in the exercise of their discretion, distribute among the stockholders. When that dis-

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tribution was made the book accounts were unchanged; except that the profit and loss account then would, and it did, in fact, show the credit item of surplus reduced to \$576,754.78. The surplus was never capitalized; but that it was carried in some form of investment is evident. A surplus of earnings and profits would, presumably, in a well-conducted business, be carried by the company in some form profitable to it; until such time as the directors should decide as to its disposition by way of distribution, or otherwise, as the corporate affairs might warrant.

Authorities need not be cited in support of the views which have been expressed. We have, upon several occasions, considered the subject of the respective rights of life tenants and remaindermen to distributions made by corporations among their stockholders of the corporate assets. It would not be profitable, at this time, to review them; inasmuch as in the latest of our decisions the principle has been fully enough discussed for the present purpose. (*Lowry v. Farmers' L. & T. Co.*, 172 N. Y. 137.) In *Lowry's* case, the Pullman Palace Car Co. declared a dividend of fifty per cent upon its capital stock, payable in new share certificates at par. The discussion was upon the effect of the corporate action and whether the distribution should be regarded as of earnings, or as an addition to capital. Upon the authority of *McLouth v. Hunt*, (154 N. Y. 179), which involved the disposition of a stock dividend, made by the Western Union Telegraph Company, as between the beneficiary of a trust and the remaindermen, we held the question to be one determinable by the facts. In each case, the corporate action was based upon an accumulation of earnings and the dividend declared was adjudged to be income and not capital. In both of the cases, it is true, the resolutions of the directors of the companies recited, in effect, that the dividend was from earnings, which had been withheld from the stockholders, or which had accumulated as a surplus "at the credit of income account." The rule, however, was laid down, in *Lowry's* case, that the determination of such a question, when presented, must be reached, *first*, by

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a consideration of the comprehensiveness of the language in which the gift is made to the beneficiary and, *secondly*, by an investigation of the facts underlying the transaction through which the corporate property is being distributed; for the statement of the directors, in taking the corporate action, is not, necessarily, conclusive. It was, also, determined that though the stockholders own, proportionately to their holdings, the right to share in the corporate assets, they belong to the corporation, until the corporate agents exercise their discretion and divide them among the stockholders. When such an appropriation of the assets is made, those who are the recorded holders of the stock at the time of the distribution are the persons entitled to receive it from the company. So in that case, where the rents, issues and profits of the trust estate were to be applied to the use of the beneficiary, it was held that the stock dividend was comprehended within the term "profits." A portion of the opinion may be quoted, as having some pertinency to the present case. It was said that "a fund had been created by an accumulation of the net earnings of the corporation and it remained a part of the general assets, until, in the judgment of the directors, the time came when it was proper and prudent to distribute it among the stockholders. That which the directors of the corporation distribute among its stockholders, without intrenchment upon capital, must be comprehended within the term 'profits,' and we should assume that the testator intended that what might be paid in that way should belong to the beneficiary. \* \* \* It was, simply, a mode of distributing the profits earned by the employment of the capital."

The *Rogers* case, (*Matter of Rogers*, 161 N. Y. 108), is not an authority, particularly, in point; because, there, the industrial corporation, whose shares of stock were held in trust, sold its plant to a new corporation for a certain amount of its stock and went out of business. In liquidating its affairs, there remained property on hand which had accumulated in the past as a surplus and consisted in government bonds, railroad stocks, real estate, etc. These were sold and

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converted into cash, and they amounted to nearly half the entire value of the corporate assets. The proceeds of the sale of these investments, which the company had held during many years of its business life, were held to be income and payable to the beneficiaries of the trusts. In that respect the case has, indeed, some bearing upon the present question. In the present case, had the directors worded their resolution, so as to read that a dividend of \$12.50 per share was declared from the company's surplus assets, I doubt if there could be much hesitation upon this question. If, in declaring a distribution of the "company's cash surplus," they created a doubt as to the subject, investigation resolves it and shows that it was a distribution of a surplus long accumulating from earnings, profits and income, which had been a part of the general assets, but was always the representative of income and not of capital. I think it needless to prolong the discussion upon this question. Sufficient has been said, in connection with the opinion of the Appellate Division, which overruled the referee upon this point, to justify the conclusion that the distribution in question was comprehended within the testator's gift to his beneficiary of the "income and profits" of the trust properties.

The disposition to be made by the trustees of the 100 shares of stock received from the Chicago, Rock Island & Pacific Railroad Company, in 1898, and of certain cash dividends, paid in subsequent years, was correctly adjudged below. The referee held that they went to the beneficiary of the trust as income, and he has been sustained by the Appellate Division. The question is one of much less difficulty than that presented in the case of the New York & Harlem Railroad Company's distribution of surplus and, as it has been carefully and well discussed in its legal aspects by the referee, it needs but slight mention here. In 1881, 1882, 1883 and 1884 the company's board of directors, by resolutions, directed the transfer from "the Profit and Loss, or Income, Account" of sums of money, aggregating \$7,000,000, to the credit of a new account, to be known as the "Addition and Improve-

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ment Account," "which shall be reimbursed to the Income Account from the proceeds of sales of bonds and stocks as shall be hereafter directed." On the dates of the passage of these four resolutions, further resolutions were adopted, which authorized the execution of bonds by the company to its treasurer, as trustee, obligating it for the re-payment to him of the amounts that were transferred from the income account, within ten years, in cash, or in shares of capital stock. Each bond, further, provided that *when it was paid*, the proceeds "shall be distributed to those who shall at the time be stockholders," proportionately to their share holdings. In 1898, resolutions were adopted, by which "all the reserved shares of the authorized capital stock of the Company" were issued to the treasurer, in payment of all the moneys due upon the bonds, except as to \$2,384,400 thereof, which shares the trustee was directed to distribute to the stockholders of record. They provided for the payment of the unpaid balance due on the bonds by directing the payment of special cash dividends to the trustee, quarterly, in each year; which he was to distribute among the stockholders. Through this corporate action, these plaintiffs, as trustees, received the 100 shares of stock and the cash dividends, in question. The remaindernien claim, in effect, that, as these obligations of the company were created in the testator's lifetime, this distribution of stock and dividends after his death should be treated as capital. The claim is untenable. The transaction was, clearly, a method of bookkeeping adopted by the company, by which the moneys to the credit of income account in its ledger could be transferred to the new account, to represent the expenditures in the improvement of the company's properties, and, at the same time, the company could be made to appear as a temporary borrower of the same and, therefore, a debtor to income account. This arrangement was, formally, expressed in the bond to its treasurer, as trustee. The funds themselves remained, as much as ever, the property of the company and they never lost their character as earnings, or income. There was no actual appropriation of them to the stockholders, until the resolu-

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tions of 1898, which provided for the payment of the bonds given to the treasurer and for the distribution by him among the stockholders of the shares and moneys in which payment was provided to be made. The bonds constituted no appropriation of the moneys to the then stockholders and the persons, who would answer that description and be entitled to share upon distribution, could not be ascertained, until the time when the bonds were paid off to, and a distribution ordered to be made by, the treasurer. The moneys were never set apart for the stockholders; nor was any indebtedness created to them, until the dates when, under the resolutions of the directors, in 1898, the stock, or the cash, became payable. (*Beveridge v. N. Y. Elev. R. R. Co.*, 112 N. Y. 1, 27.) The distinction between this case and *Brundage v. Brundage* (60 N. Y. 544), is plain and substantial, and is well pointed out by the referee. In that case, each stockholder received the certificate of the New York Central & Hudson River Railroad Company declaring that he was entitled to a sum specified; which certificate carried dividends and was transferable on the books. The resolution, under which the certificates were issued, recited an application of earnings to construction and other purposes, and that the stockholders were entitled to evidence, and to reimbursement, of such expenditure, and, then, provided for the issuance of the certificates; of which the testator, in that case, as a stockholder, received his proportionate number. Both resolution and certificates evidenced a present indebtedness and it was held that the certificates passed as a part of the testator's residuary estate. In the present case, the obligation of the company, as expressed in its bonds to the treasurer, as trustee, was for the benefit of those stockholders only, who should be such at the time "when the bond is paid." It conferred no right upon existing stockholders. It was no more than an incident to the testator's ownership of stock and, being such, passed to these trustees, who became the owners of record. A consideration of the opinions in *Boardman v. L. S. & M. S. Ry. Co.*, (84 N. Y. 157), and in *Jermain v. Same Co.*, (91 ib. 483), will

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make the rule in such cases clear, by which the rights of stockholders are to be governed with respect to an appropriation of net earnings to the payment of dividends. It was held that a dividend belongs to the person who is the holder of the stock at the time it is declared. The assets remain, at all times, the property of the corporation "until a division is made or a dividend is declared" and, until that time, what contractual right to a dividend the stockholder may be deemed to possess would pass with an assignment, or transfer, of the stock, as an incident thereto. As the referee, very correctly, decided "the stock, to which, as an incident, the right to the proceeds of the bonds attached, had \* \* \* become vested in the trustees \* \* \* and, as a consequence, the dividends from the proceeds, \* \* \* became payable to the trustees and are to be regarded, like all other income of the trust fund, as the absolute property of the life tenant."

The questions as to the new shares of stock purchased by the trustees, in the exercise of their right to subscribe therefor, and as to the sums of money received by them from sales of subscription rights upon the stocks given by the will in creation of the trust, were correctly decided in favor of the remaindermen.

So, also, was the question correctly decided, which the remaindermen raised as to the obligation upon the trustees to maintain a sinking fund, with which to make good any depreciation in the value of the securities by the falling off in the premiums. This rule has no application where the securities have been specifically bequeathed. It, only, applies, in ordinary cases and where the will affords no aid upon the subject of the testator's intention, when trustees have, themselves, made investments from the trust funds, in the purchase of securities at a premium. (*N. Y. Life Ins. & Trust Co. v. Baker*, 165 N. Y. 484, affirming the decision in 38 App. Div. 417.)

A question was raised as to the right of the trustees to the statutory commissions on the entire capital of the trust received by them. The plaintiffs had accounted, as executors of the

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estate, in 1893, and, pursuant to the decree upon their accounting, had turned over to themselves, as the trustees appointed by the will, the securities which constituted the trust fund for the testator's widow. At that moment they assumed a new office, with distinct duties and responsibilities. Upon the present accounting, as trustees, the statute provision as to commissions was contained in section 3320 of the Code of Civil Procedure, as amended in 1904, and that gave to "trustees of an express trust \* \* \* as compensation for services \* \* \* commissions, as follows: for receiving and paying out all sums of principal," five per cent on the first \$1,000, two and one-half per cent on the next \$10,000, and one per cent on the balance. Commissions were given, at the like rates, for receiving and paying out income in each year. Before this amendment of the statute, a trustee was allowed commissions upon the same rule that was applied in the case of an executor, or administrator. (See Code of Civil Procedure, sections 2730, 2802, 2811.) That rule, however, fixed the commissions upon the receiving and the paying out of "*all sums of money*" and, as it was applied, trustees would not be allowed commissions upon specific securities bequeathed in trust and received, in advance of their conversion into money, or except in a case where the securities have been turned over to the parties entitled, as cash. (*McAlpine v. Potter*, 126 N. Y. 285; *Phoenix v. Livingston*, 101 ib. 451.) When the Legislature amended section 3320, by adding the present special provision for the compensation of trustees, its amendment must be considered to have been enacted in view of what the statute already provided, as construed by the courts. The amendment established a new and different rule governing their compensation; leaving section 2730 unchanged and to govern as to executors and administrators. A trustee became, then, entitled to commissions "for receiving and paying out all sums of *principal*" and "for receiving and paying out *income* in each year." They were to be no longer fixed by analogy to the rule in the case of an executor and based upon "*all sums of money*" received and paid out.

The change of phraseology was too deliberate to be disregarded and something different from the existing rule must have been intended. If this were not so, a mere change in the sections relating to executors and administrators, so as to make them applicable to trustees, would have sufficed. As a provision for a more liberal measure of compensation, it, certainly, is most reasonable, in view of the responsibility devolved upon the trustee for the preservation of the trust estate. Usually, as in the case of this will, trustees have a discretionary power of sale and they have to decide as to the continuance of the trust in the securities received, or whether there shall be sales and reinvestment of the same. Their interest in commissions should not be allowed to affect their judgment. Evidently, the legislature, recognizing the ambiguity in the Code provisions with reference to trustees, intended to establish by the amendment, somewhat artificially expressed, a rule, which, as I construe it, gives to trustees the right to commissions, in such a case, upon the value of the securities, both for receiving them and for paying them over. The value of the securities in this trust was ascertained and I think that the Appellate Division correctly held, overruling the referee, that these plaintiffs, as trustees, were entitled to one-half commissions for receiving the entire capital of the trust estate.

As to the right of the testator's widow, the beneficiary of his trust, to act as trustee, the referee held, and the Appellate Division has affirmed his decision, that she could do so. I think that the decision was correct. If she were the sole trustee, the question might be different, (see *Woodward v. James*, 115 N. Y. 346, 357, and *Greene v. Greene*, 125 ib. 506); but she is, certainly, competent to act as trustee with others, in the management of the trust; if not as to her own interests, so far, at least, as it has to do with the preservation of the fund for the remaindermen. (*Rogers v. Rogers*, 111 N. Y. 228.) She was selected by the testator as one of the trustees to preserve the estate and the legal title vested in all of them. She had duties to perform as a trustee, aside from what concerned

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herself, and they were for the benefit of the remaindermen, and there is no reason why she should not receive the same commissions as her co-trustee upon the *corpus* of the trust. The statute, (Code of Civil Procedure, sec. 3320), makes no distinction and gives to two, or more, trustees of an express trust the compensation therein specified.

No other questions demand our consideration. Those discussed have been well and carefully dealt with below and their review here is justified by their importance, or by their novelty. The conclusion reached is that the judgment entered upon the order of the Appellate Division, and now appealed from, was correct and should be affirmed. Some of the questions presented by the appeal have not been free from difficulty and they have been very carefully and ably argued in behalf of the trustees and the remaindermen. I advise that costs be allowed to both and, that the burden may be equitably borne, that they should be paid out of the capital of the trust estate.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT and WILARD BARTLETT, JJ., concur; HISCOCK and CHASE, JJ., concur in result.

Judgment affirmed.

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SARA B. PARSONS, Respondent, *v.* GEORGE R. TELLER, as Administrator with the Will Annexed of the Estate of DAISY F. K. SMITH, Deceased, Appellant.

**CONTRACT BY INFANT — CONSIDERATION — RATIFICATION.** The facts examined in an action upon an alleged contract executed by a decedent while she was an infant, to pay an annuity to a friend, and held that it was a mere voluntary provision for the plaintiff based on gratitude and affection and, therefore, without such a valuable consideration as would have supported an action had decedent been of age when she entered into it; and that certain payments made by decedent after attaining her majority and relied upon as constituting a ratification of such contract were insufficient for that purpose.

*Parsons v. Teller*, 111 App. Div. 637, reversed.

(Argued March 7, 1907; decided April 16, 1907.)

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Points of counsel.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 12, 1906, affirming a judgment in favor of plaintiff, entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John G. Milburn* and *Lewis Cass Ledyard, Jr.*, for appellant. There was no consideration for the contract of 1890. (*Sims v. Everhardt*, 102 U. S. 300; *McGreal v. Taylor*, 167 U. S. 688; *Lowell v. Daniels*, 2 Gray, 161; *Brown v. McCune*, 5 Sandf. 224; *Murphy v. Holmes*, 87 App. Div. 366; *Wheelwright v. Moore*, 1 Halt, 201; *Weller v. Hersee*, 10 Hun, 431; *Dolcher v. Fry*, 37 Barb. 152; *Spear v. Downing*, 34 Barb. 522; *Burnett v. Bisco*, 4 Johns. 235.) Even if there was a sufficient consideration to support the contract of 1890, that contract having been made by an infant, was voidable and unenforceable because it was not ratified by Mrs. Smith after she became of age. (Clark on Cont. 242; Hammond on Cont. 255; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Jackson v. Carpenter*, 11 Johns. 542; *Austin v. Patten*, 11 S. & R. 311; *Baylis v. Dinely*, 3 M. & S. 482.) The contract of 1890 was not merely voidable, but void, since it was made by an infant and appears, upon its face, to be, and must necessarily have been, to her prejudice. (*Tucker v. Moreland*, 10 Pet. 58; *McGreal v. Taylor*, 167 U. S. 688; *Oliver v. Houblet*, 13 Mass. 239.)

*Lyman M. Bass* and *Edward H. Letchworth* for respondent. The contract was voidable merely and not void. (*Henry v. Root*, 33 N. Y. 526; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Halsey v. Reid*, 4 Hun, 777; *Blinn v. Schwarz*, 177 N. Y. 252; *Hyer v. Hyatt*, 12 Fed. Cas. 11, 17.) The contract was duly ratified by Mrs. Smith after she came of age. (*Golson v. Ebert*, 52 Mo. 260; *Thompson v. Ketchum*, 8 Johns. 189; *Walsh v. Powers*, 43 N. Y. 23; *Beardsley v.*

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*Hotchkiss*, 96 N. Y. 201; *Youmans v. Forsythe*, 86 Hun, 370; *Hunt v. Massey*, 5 B. & Ad. 902; *Orvis v. Kimball*, 3 N. H. 314.) There was a valid consideration for the contract. (*Fuller v. Artman*, 69 Hun, 546; *Forgotson v. Cragin*, 62 App. Div. 243; *Olin v. Arendt*, 27 Misc. Rep. 270; *Baird v. Baird*, 81 Hun, 300; 145 N. Y. 659; *Williams v. Whittell*, 69 App. Div. 340; *Kam v. Benjamin*, 10 App. Div. 419; *Hickok v. Bunting*, 92 App. Div. 167; *Ryan v. Grawney*, 125 Mo. 474; *Ostrander v. Quin*, 84 Miss. 230; *Ingram v. Ison*, 80 S. W. Rep. 787.)

CULLEN, Ch. J. This action is brought against the defendant as administrator of the will annexed upon the following agreement executed by his testatrix: "This agreement, made this eighteenth day of December, in the year one thousand eight hundred and ninety, between Daisy King Smith, wife of Willoughby Statham Smith, and said Willoughby S. Smith, of London, England, of the first part, William J. King, as guardian of the said Daisy King Smith, of the second part, and Sara B. Parsons, now of Buffalo, of the third part:

"Witnesseth:

"Whereas, the party of the third part heretofore entered the employment of the said Daisy King Smith, then Daisy Fletcher King, upon the agreement that such payment should be continued whether so employed or not, or she should be otherwise provided for in case of the marriage of said Daisy Fletcher King;

"And, whereas, said Daisy Fletcher King having now intermarried with said Willoughby S. Smith, and intending to live in England, desires to carry into effect such agreement and understanding;

"Now, therefore, in consideration of the premises, the services heretofore performed by said Parsons and of one dollar to them in hand paid, the receipt of which is hereby acknowledged, the parties of the first part have covenanted and agreed and hereby do covenant and agree to pay to the said party of the third part annually during her life the sum

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of eighteen hundred dollars in quarterly payments of four hundred and fifty dollars each, and the parties of the first part do hereby bind themselves, their heirs and representatives accordingly;

“ And whereas, the said Daisy King Smith is now a minor, of the age of eighteen years;

“ And whereas, the said party of the second part is her guardian, having in his custody her income during her minority, the parties of the first part do hereby authorize, empower and direct the party of the second part to pay the party of the third part such annuity commencing with the first day of December, 1890, and thereafter pay the same pending the minority of the said Daisy King Smith from any income in his hands belonging to her, and the receipt of the party of the third part shall be a good and sufficient acquittance to the party of the second part for all such payments.

“ And the parties of the first part do hereby covenant and agree that they will indemnify and save harmless the party of the second part from any liability on account of any such payments, and that so soon as Daisy King Smith shall attain the age of twenty-one years, they will, by their solemn instrument, ratify and confirm all such payments.

“ But in case of the decease of the said Daisy King Smith, the liability of the said Willoughby S. Smith under this agreement shall cease and determine.

“ And the party of the second part hereby assents to the provisions hereof.

“ In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

“ DAISY KING SMITH, [SEAL.]

“ WILLOUGHBY STATHAM SMITH, [SEAL.]

“ WM. J. KING, GUARDIAN, [SEAL.]

“ SARA B. PARSONS. [SEAL.]”

Daisy King (Smith) was born in March, 1872; her mother died in her infancy, and she with her two brothers, who were some years older than herself, lived with their grandmother,

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Mrs. Pratt, at Buffalo, until the death of the latter in 1885. The plaintiff, a distant connection of Mrs. Pratt, became a member of that lady's household in 1878, and so continued till the year 1884. While a member of Mrs. Pratt's household she was engaged in the care and education of the plaintiff. After her grandmother's death Daisy King, with one of her brothers, went to live with the plaintiff in a boarding house kept by the latter in New York city. She continued to live there, attending day school for some two years, after which time the plaintiff accompanied her to Europe, where they remained some six months. On their return Daisy King took an apartment in New York, where she and the plaintiff lived until December, 1890, when Daisy King married Willoughby Smith, a resident of England. After the marriage Mr. and Mrs. Smith removed to England, where they continued to reside until the death of Mrs. Smith, in February, 1902. At the death of Mrs. Smith there was found among her papers attached to the agreement, the subject of this suit, the following letter from the plaintiff to her and her answer thereto:

“March 1st, 1888.

“My Dear DAISY:

“As you have often expressed your willingness to give me the sum of eighteen hundred dollars per year until you arrive at the age of twenty-one years, if you will write me to this effect I shall be very grateful.

“Yours faithfully,

“To Miss DAISY F. KING. SARA B. PARSONS.”

“503 FIFTH AVE., N. Y., Mch. 2, 1888.

“My Dear SARA:

“Your letter of the 1st inst. received. I am perfectly willing to give you the sum therein mentioned (\$1,800 per year) until I reach the age of twenty-one years. I think I can say in all truth and sincerity there are few with whom I could have been constantly day and night as I have been with you and always have found them the same, true, devoted, faithful, fond, always willing to share and sympathize with me in my sorrow or joy as the case may have been. I can assure you

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that I appreciate all your kindness in past years, and if at any time I can aid you or yours in any way it will only be a great pleasure to me to do so if such an occurrence may present itself. I trust we may always be together, that is, until either may find the proper person, one to whom we may give our heart and even after that. I agree to your offer and with many, many thanks, I am,

“Your sincere friend,  
“D. F. KING.”

From the time of the marriage of Daisy King up to her death the plaintiff was paid regularly the monthly installments of the allowance specified in the agreement, except that during a time, the plaintiff having become pecuniarily embarrassed, deductions were made for the purpose of settling with her creditors. After Mrs. Smith's marriage the plaintiff was in no respect a member of her household, nor did she render any services to the former. The relation of warm friendship, however, continued and Mrs. Parsons at times visited the deceased. Daisy King had inherited a substantial fortune, approximately three hundred thousand dollars. There is no contention that the plaintiff was not fully paid for such services as she may have rendered or expenditures she may have made for Daisy King as would have constituted the basis of any legal claim against the latter. Miss King had ample means and her guardian, her father, seems to have allowed her to live, if not luxuriously, at least with every comfort. The plaintiff had very narrow means, and there is no suggestion that at any time she made any demand on Miss King's guardian which was refused. The presumption must be that the guardian discharged any claim the plaintiff might have had during the period of Miss King's infancy, and there is no pretense to the contrary. This action is based solely on the agreement executed by Mrs. Smith while she was still a minor and her ratification of the agreement after she became of age. The trial court found as matters of fact both that there was consideration for the agreement executed by the deceased and that she ratified it after reaching her majority. As these

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findings, however, have been affirmed by a divided court the question presented to us is whether there was any evidence justifying the conclusion reached by the trial court, and our examination of the record convinces us that neither has sufficient support.

There is little that can be added to the very clear opinion of Presiding Justice McLENNAN, who dissented in the Appellate Division. There are certain propositions of law that we regard as firmly settled. "An equitable consideration founded on mere love or affection or gratuity, which although it will support a contract as between the parties when executed, will not support an action to enforce an executory contract." (*Story on Contracts*, secs. 429, 465, 469; *Ehle v. Judson*, 24 Wend. 97; *Stafford v. Bacon*, 1 Hill, 532; *Cameron v. Fowler*, 5 id. 306.) But if there be an equitable obligation which would also be a legal one were it not for the legal disability of the party, such as infancy or coverture, then the obligation, which is not merely moral, but also equitable, is sufficient consideration to support a new promise after the disability of the promisor has ceased. (*Goulding v. Davidson*, 26 N. Y. 604.) The first question, therefore, presented is whether there was a valuable consideration which would have supported the contract sued on had the deceased been of age at the time she entered into it, for if the contract was without consideration, subsequent ratification without further consideration could not give it force. We think the evidence clearly shows that the contract was a mere voluntary provision for the plaintiff, based on gratitude and affection. The letter of the plaintiff of March 1st, 1888, characterizes unequivocally the relation between the parties and the nature of the plaintiff's demand. It is an appeal to the bounty of the testatrix, not for the payment or discharge of any claim. The answer of the testatrix confirms this view. When the testatrix married she went further than the plaintiff had asked, and promised not only to make the allowance of eighteen hundred dollars a year during her (the testatrix's) minority, but during the plaintiff's life. If there was any consideration

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for the agreement to pay eighteen hundred dollars a year during the testatrix's minority, there certainly seems no consideration for the agreement to further continue the payment. Nor does the contract sued on evidence any real or substantial consideration. It recites that the plaintiff had entered the employment of the deceased "upon the agreement that such payment (what the payment is is not specified) should be continued, whether so employed or not, or she be otherwise provided for in case of the marriage of the said Daisy Fletcher King." The agreement on its face was for no specified time, and could be ended at any time. There was no claim for services rendered under the agreement, but the consideration was wholly prospective. The plaintiff did not agree to remain in the employment of the deceased, nor did she render any services thereafter. It is true that mere inadequacy of consideration will not avoid a promise to pay a specific sum (*Earl v. Peck*, 64 N. Y. 596), but in the case cited the trial court charged the jury that if the real intent and purpose of the note sued on was to go beyond any indebtedness and make a gift or present to the plaintiff, then it was void. In view of the recitals of the agreement itself, the previous correspondence between the parties and their relations, it seems to us plain that the agreement was a mere voluntary provision in favor of the plaintiff made by the deceased out of motives of gratitude and affection. We do not underrate the kindness and affection bestowed by the plaintiff on the deceased, nor did the deceased fail to appreciate it. As long as she lived the payments were regularly made to the plaintiff. The deceased became of age in March, 1893, and on April 13th of that year, within a month after becoming of age, she made her will by which she bequeathed eight thousand pounds, approximately forty thousand dollars, in trust, the income to be applied to the plaintiff during her life. The income of this fund fairly invested at four and a half per cent would equal the annuity specified in the agreement. A second will was made by the testatrix on March 11th, 1897, in which the same provision is made for the plaintiff except that the income is secured to

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her use against possible claims of creditors. This last will has been probated and under it, by an order of the surrogate, after the lapse of several months, the plaintiff is receiving her full annuity.

We think these testamentary provisions are not without force in determining the character of the obligation into which the deceased entered when she executed the agreement of December, 1890. They tend to show that the deceased appreciated the fact that the agreement would not bind her estate, and intended by her will to secure to the plaintiff the payment she had promised. On the question of ratification they are of much greater importance. They are not mere self-serving declarations made in the party's own favor to avoid liability on the contract. The contract, even if originally supported by a sufficient consideration, could not become binding upon the deceased unless she ratified it after becoming of age. It is not the case of an executed contract, where failure of an infant to disaffirm within a reasonable time after becoming of age would of itself operate as a ratification. It required affirmative action by the deceased to impose the obligations of the contract upon her. The alleged ratification in this case is based on the fact that during Mrs. Smith's life she continued to make payments under the agreement. That the deceased intended to live loyally to her promise to the plaintiff is unquestionable, and she has done so. But the question remains whether by making these payments she intended to acknowledge and ratify the agreement of 1890 as imposing valid legal obligations upon herself and her estate, or a merely voluntary obligation which gratitude and honor required her to fulfill. The first payment made from the funds of the deceased after her becoming of age was in May, 1893. She had already then made the will containing the provision in the plaintiff's favor, and it is in the light of that provision that the payment of May, 1893, must be considered. So considered it should be interpreted as a payment out of the testatrix's bounty, not in pursuance of any legal obligation. The record is devoid of evidence, except

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the mere fact of the payments, tending to show that the deceased intended to recognize the legal obligations of the contract of 1890, and these payments, under the circumstances, we think, were insufficient for the purpose.

The judgments of the Appellate Division and of the Trial Term should be reversed and a new trial granted, costs to abide the event.

GRAY, HAIGHT, WILLARD BARTLETT and HISCOCK, JJ., concur; EDWARD T. BARTLETT and CHASE JJ., dissent.

Judgments reversed, etc.

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JACOB ROTHSCHILD et al., as Executors of and Trustees under the Will of SIMON GOLDENBERG, Deceased, Respondents, v. JACOB II. SCHIFF et al., Appellants, and MARY GOLDENBERG et al., Respondents.

1. **WILL — GIFT TO TRUSTEES FOR CHARITABLE PURPOSES — WHEN THE TRUSTEES, NOT THE SUPREME COURT, ARE CHARGED WITH THE DUTY OF EXECUTING THE TRUST.** Where a testator gave his residuary estate to his executors, as trustees, to pay the income thereof to his widow during her life, and after her death he gave a number of specific legacies from the residuary estate, and then gave the remainder thereof to designated persons, requesting them to apply such fund to the creation of a charitable or educational institution, or, if that should not be expedient, to the enlargement of the endowment of an existing charitable institution, the disposition of the fund within the limits indicated being intrusted to the judgment and discretion of such persons, the title to such residuary estate is vested in them as trustees and joint tenants under the statute regulating gifts for charitable purposes (L. 1893, ch. 701), and so long as any of them survive, they, and not the Supreme Court, are invested with the power, and charged with the duty, of executing the trust.

2. **WHEN, AND HOW, TRUSTEES MAY DISPOSE OF TRUST FUND BEFORE DEATH OF LIFE TENANT — ERRONEOUS AND UNAUTHORIZED DIRECTION BY SUPREME COURT.** A finding by the referee, in an action brought for the construction of such will, that it would be inadvisable to establish an independent institution with the residuary fund and that a majority of the trustees have decided that the fund should be given to a certain educational institution, does not warrant a direction by the Supreme Court that, upon the death of the life tenant, but not until then, the fund should be used for the benefit of such institution; the action of the trustees did

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not constitute an execution of the trust nor operate to transfer the property of the trust or determine the disposition thereof; the trustees, as such and as joint tenants, must join in the execution of some written instrument sufficient to convey the real, as well as the personal property of which the trust is composed; while the trustees take the property of the trust as remaindermen, subject to the life estate of testator's widow, they have the power to dispose of their interest therein and execute the trust during the lifetime of the life tenant (Real Property Law; L. 1896, ch. 547, § 49); whether they ought, or ought not, to do so, before the death of the life tenant, must be determined by the united judgment and discretion of the trustees, themselves, and no duty now devolves upon the Supreme Court to direct them to act at any particular time; if they should fail to execute the trust and the estate become vested in the Supreme Court, the court may then assume jurisdiction and carry out the trust; until that time, however, it has no jurisdiction to direct any disposition of the fund.

**8. EVIDENCE — WHEN TESTIMONY AS TO STATEMENTS OF TESTATOR REGARDING THE PURPOSE OF TRUST CREATED BY HIM IS COMPETENT.** The reception of evidence, upon the trial of an action for the construction of testator's will, as to the conversation and declarations of the testator with reference to institutions that he favored, was not erroneous; the trustees of the residuary estate are to exercise their judgment and discretion in disposing of this estate and in discharging this duty they may, if they so desire, avail themselves of the judgment and desires of the testator.

*Rothschild v. Goldenberg*, 103 App. Div. 285, modified.

(Argued April 16, 1907; decided April 23, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 22, 1905, which modified and affirmed as modified a judgment construing the will of Simon Goldenberg, deceased, entered upon the report of a referee.

The facts, so far as material, are stated in the opinion.

*Louis Marshall and Jacob Steinhardt* for appellants. Subdivision 15 of paragraph 23 of the will of Simon Goldenberg is valid, and pursuant to its terms the persons therein named became vested, as trustees, at least, with the title to the testator's residuary estate. (L. 1893, ch. 701; *Allen v. Stevens*, 161 N. Y. 122; *Mutter of Graves*, 171 N. Y. 47; *Williams v. Williams*, 8 N. Y. 525; *Levy v. Levy*, 33 N. Y. 97; *Mutter of Griffin*, 167 N. Y. 81; *Smith v. Chesebrough*, 176

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N. Y. 321; *Bowman v. D. & F. M. Society*, 182 N. Y. 494; *Robb v. W. & J. College*, 185 N. Y. 495; *Kingsbury v. Brandegee*, 113 App. Div. 606; *Omnianney v. Butcher*, 1 T. & R. 260; *Moggridge v. Thackwell*, 7 Ves. 36; *Russell v. Allen*, 107 U. S. 163.) The attorney-general representing the state and the appellants as trustees properly came before the Supreme Court, upon a state of facts which is undisputed, to obtain instructions as to how the testator's charitable purpose could be best subserved. (*People ex rel. N. Y. C. & W. Ry. Co. v. R. R. Comrs.*, 81 App. Div. 237; *Atty.-Gen. v. Guise*, 2 Vern. 166; *Atty.-Gen. v. Baliol College*, 9 Mod. 407; *Atty.-Gen. v. Glasgow College*, 2 Collyer, 665; *Atty.-Gen. v. Craven*, 21 Beav. 392; *Atty.-Gen. v. Pyle*, 1 Atk. 435; *Atty.-Gen. v. Ironmongers Co.*, 2 M. & K. 576; *Atty.-Gen. v. Hicks*, 8 Brown's C. C. 166; *Atty.-Gen. v. Gibson*, 2 Beav. 317; *Moggridge v. Thackwell*, 7 Ves. 96; 13 Ves. 416.)

*John J. Crawford and Charles H. Brush* for plaintiffs, respondents.

*William S. Jackson, Attorney-General (George P. Decker of counsel)*, for the State of New York, respondent.

HAIGHT, J. This action was brought by the executors of and trustees under the last will and testament of Simon Goldenberg, deceased, to obtain a judicial construction of the fifteenth subdivision of the twenty-third clause of his will and for a determination as to whether it was valid.

The testator, in his will, after providing for the payment of his just debts and funeral expenses, made provision for the erection of a mausoleum in a cemetery designated and then made a number of bequests to charitable or educational corporations. He then gave and devised all the rest, residue and remainder of his estate to his executors, in trust, to collect the rents, issues and profits and to pay the same over to his widow during her life. After her decease he gave from the

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principal of the trust a number of legacies to relatives and friends and then, by the clause in question provided, "I give, devise and bequeath all the rest, residue and remainder of my estate, together with such other estate, both real and personal, as to which for any cause I may die intestate, after the payment of the foregoing bequests, to Jacob H. Fleisch, Jacob H. Schiff, Julius Goldman, M. Warley Platzenk, Isaac Wallach, Jacob Rothschild, Simon Ottenberg, Joel Goldenberg and Louis Seeberger, or the survivors of them, all of the City, County and State of New York; and it is my wish that said persons apply the said rest, residue and remainder of my estate and property to the creation of some charitable or educational institution in the city of New York. I desire to place no restriction upon them with regard to the character of such charitable or educational institution, excepting that I desire the same to be non-sectarian, and that I do not desire to have the fund hereby created to be divided between existing charities (but this not to preclude said legatees from enlarging or placing upon a solid foundation an existing charitable institution if they shall deem it advisable so to do), having full confidence that they will found a charity which will add something to the physical, moral or intellectual improvement of those for whose benefit they will create such institution."

The action was tried before a referee, and upon such trial evidence was taken under an answer interposed by the appellants, in which the court was asked to determine the disposition that should be made of the property so devised or bequeathed, and upon such evidence the referee found that "It would not be advisable to establish an independent institution, charitable or educational in its nature, with the residuary estate of Mr. Goldenberg, the testator, since it would not be practicable to create an efficient institution with no greater endowment than the sum which the will made available for the purpose, and a majority of the trustees named in the clause in question have reached the conclusion that the only institution to which the testator's ideas as contained in his will could be applied is The Hebrew Technical Institute of the

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City of New York." The referee also found that the clause of the will in controversy was valid and ordered judgment to that effect, and that, upon the death of the life tenant, the fund should be used for the benefit of such institute. Appeal was thereupon taken from so much of the judgment as adjudged that the fund should be given to the institute. The Appellate Division, upon its review, not only modified the judgment by striking out the provision alluded to but inserted a provision to the effect that the persons to whom the trust estate had been given, or the survivors of them, should not determine the use to which such estate should be devoted until after the property had been turned over to them upon the death of the life tenant. No appeal has been taken from the judgment in so far as it determined the provision of the will alluded to to be valid. It consequently follows that the only question presented upon this review pertains to that part of the judgment which undertook to dispose of the property of the trust estate after the death of the testator's widow.

Again, referring to the provision of the will, it will be observed that the devise and bequest of the remainder, etc., to Fleisch, Schiff and others, or the survivors of them, while absolute in form is qualified by the expression of a wish on the part of the testator that the persons named by him should apply that portion of his estate and property to the creation of some charitable or educational institution or for the enlarging or placing upon a solid foundation an existing charitable institution. While he has not, in express terms, stated that the persons named should take as trustees, we think that which follows clearly indicated an intention that they should take, not as tenants in common, but as trustees and joint tenants, the title vesting in the survivors of them. We, therefore, have a case presented in which a testator has given to certain persons named property in trust, to dispose of for charitable and educational purposes, leaving the selection of the institution that should receive his bounty to the judgment and discretion of the trustees, bringing it within the provisions of chapter 701 of the Laws of 1893, in which it is provided:

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"If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court." It is thus apparent that the title of the property in question vested in the trustees named in this provision of the will and that, so long as any of the trustees survive, they, and not the Supreme Court, are given the power and charged with the duty of executing the trust. We do not understand that the trustees have as yet executed the trust. It is true, the referee has found that a "majority of them have reached the conclusion that the only institution to which the testator's ideas could be applied is The Hebrew Technical Institute of the City of New York;" but this is not sufficient. A mere discussion between the majority of the trustees from which they reach a conclusion, does not operate to transfer the property nor definitely and irrevocably determine the disposition that should be made of it. While the trust estate consists largely of personal property, as we understand, it still contains some real estate. As trustees and joint tenants they must all join in any transfer that is made, and it can only become operative by the executing of some deed or other written instrument sufficient in law to convey the property of which the trust estate is composed. This action on their part has not, as yet, been taken, as appears from the findings of the referee. But, as we have seen, the power and the duty is with the trustees, and we must assume that at the proper time they will discharge their duties under the trust without interference on the part of the court. If, however, they should not execute the trust and the estate should become vested in the Supreme Court, it will then be time for the court to assume jurisdiction and execute the trust. We, therefore, conclude that the judgment entered upon the report of the referee, in so far as it was appealed from, was unauthorized in law.

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The Appellate Division upon its review, as we have seen, modified the judgment appealed from in the particular referred to by providing, in substance, that the trustees should not discharge their duties under the trust until the termination of the life estate and they had become vested in possession with the property embraced in the trust. We are inclined to the view that even this interference by the court with the action of the trustees is also unauthorized in law. As we have seen, the property which these trustees are to take is a part of the trust property which is set apart and held for the benefit of the testator's wife during her life. These trustees, therefore, take as remaindermen; their estate is an estate in expectancy. Under the Real Property Law an expectant estate is alienable in the same manner as an estate in possession. We, therefore, are of the opinion that the trustees have the power to dispose of their interest in the trust property in question and execute the trust even during the lifetime of the life tenant. It is contended, however, that they ought not to do so, for the reason that the character of the institution selected by them might change and become objectionable before the falling in of the life estate. On the other hand, it is contended that they ought to act promptly, for the reason that the testator had selected as his trustees a number of gentlemen in whom he reposed confidence, and that it was their united judgment and discretion that he sought to obtain in carrying out the purposes for which he made his bequest. These contentions, however, present reasons which may properly be considered by the trustees in enabling them to determine when they should take final action in the matter, and no duty now devolves upon the court to direct them to act at any particular time. It has also been stated that the testimony as to the conversation and declarations of the testator with reference to institutions that he favored was improperly received. Of course, oral statements or declarations of the testator cannot be received to contradict or impeach the provisions of an unambiguous will; but we do not understand that the evi-

dence was received for such a purpose. The trustees are to exercise their judgment and discretion in disposing of this estate. In aiding them in the discharge of this duty we see no reason why they may not, if they so desire, avail themselves of the judgment and wishes of the testator.

The judgment of the Appellate Division should be modified by striking therefrom the clause prohibiting the trustees from determining the application that should be made of the trust property until after it had been paid over to them, and as so modified affirmed, without costs of this appeal to either party.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ., concur; WERNER, J., dissents solely from modification.

Judgment accordingly.

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BROOKLYN UNION GAS COMPANY, Respondent, *v.* THE CITY OF NEW YORK, Appellant.

GAS AND ELECTRICITY — REASONABLENESS OF PRICE FIXED BY STATUTE — TRANSPORTATION CORPORATIONS LAW (L. 1890, CH. 566), § 70 — NEW YORK CITY. Where the price of a commodity is established by law (in this case illuminating gas furnished to the city of New York in the borough of Brooklyn), whatever price the legislature permits to be charged must be deemed to be reasonable, and when the seller makes a charge of less than the maximum, the purchaser cannot resist payment upon the ground that the statute has permitted an unreasonable charge.

*Brooklyn Union Gas Co. v. City of New York*, 115 App. Div. 69, affirmed.

(Argued April 1, 1907; decided April 30, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 5, 1906, which affirmed an order of Special Term denying a motion for an inspection of defendant's books, records and documents, and for an inventory of its plant.

The facts, so far as material, and the questions certified are stated in the opinion.

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Points of counsel.

*William B. Ellison, Corporation Counsel (Theodore Connelly and William P. Burr of counsel), for appellant.* The reasonableness of the rate fixed is always a question for the court, and although the price of gas is fixed by the legislature, the consumer, as well as the manufacturer, may question its reasonableness in the courts. (*C., etc., R. R. Co. v. Minnesota*, 134 U. S. 461; *Reagan v. F. L. & T. Co.*, 154 U. S. 362; *C., etc., T. Co. v. Sanford*, 164 U. S. 578; *I. C. Comm. v. Ry. Co.*, 167 U. S. 479; *Smyth v. Ames*, 169 U. S. 466; *S. D. L. & T. Co. v. National City*, 174 U. S. 739; *Griffin v. G. W. Co.*, 122 N. C. 206; *R. L. & C. D. Water Co. v. City of Redlands*, 121 Cal. 312; *Trammel v. Dinsmore*, 102 Fed. Rep. 794; *Cedar Water Co. v. City of Cedar Rapids*, 118 Iowa, 259.) The fixing of a maximum rate for supplying gas does not give the companies supplying a vested right to that rate. (*Huggles v. Illinois*, 108 U. S. 526; *Railroad Commission Cases*, 116 U. S. 307; *Georgia Banking Co. v. Smith*, 128 U. S. 174; *Winchester, etc., Co. v. Croxton*, 98 Ky. 739; *Atty.-Gen. v. C. G. L. & C. Co.*, 34 Ohio, 572.) In the absence of contract obligation a public service corporation is entitled only to reasonable compensation. (*H. G. L. Co. v. Mayor, etc.*, 33 N. Y. 509; *Matter of Dugro*, 50 N. Y. 513; *Baird v. Mayor, etc.*, 96 N. Y. 583; *Gleason v. Dalton*, 28 App. Div. 555; *N. R. E. Co. v. City of New York*, 48 App. Div. 14.) The legislature and the public are not one to the extent that the legislature having passed an act regulating rates, the public are thereafter estopped from attacking the reasonableness of such rates. (*R. P. W. Co. v. Fergus*, 178 Ill. 571; *Pond v. N. R. W. Co.*, 183 N. Y. 330; *M. N. G. Co. v. City of Muncie*, 160 Ind. 97; *Covington v. Sanford*, 164 U. S. 578; *Griffin v. Goldsboro*, 122 N. C. 206; *People ex rel. v. M. G. L. Co.*, 45 Barb. 136; *Sheppard v. M. G. L. Co.*, 6 Wis. 539; *B. G. L. Co. v. Coloday*, 25 Md. 1.)

*William N. Dykman* for respondent. The maximum price fixed by statute is a reasonable price and lawful and the

plaintiff may collect any price which does not exceed such maximum. (*Munn v. Illinois*, 94 U. S. 113; *Johnson v. H. R. R. Co.*, 49 N. Y. 455; *Lewis v. N. Y. C. & H. R. R. Co.*, 49 Barb. 334; *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *Barnett v. B. H. R. Co.*, 53 App. Div. 432; *Budd v. New York*, 143 U. S. 517; *Detroit v. D., etc., R. Co.*, 184 U. S. 388; *Sorrel v. C. R. R. Co.*, 75 Ga. 509; *W., etc., Co. v. C. & A. R. Co.*, 52 Fed. Rep. 716.) The court cannot review the legislative declaration that the maximum price is reasonable. (*Munn v. Illinois*, 94 U. S. 113; *L. S. R. Co. v. Smith*, 173 U. S. 684; *People v. Budd*, 117 N. Y. 1; *R. R. Com. Cases*, 116 U. S. 307; *C., etc., R. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. T. L. & T. Co.*, 154 U. S. 262; *Smyth v. Ames*, 169 U. S. 466; *Noblesville v. Gas Co.*, 157 Ind. 162; *Gas Co. v. Des Moines*, 72 Fed. Rep. 829; *Logansport Gas Co. v. Peru*, 89 Fed. Rep. 185.)

O'BRIEN, J. This action was brought by the plaintiff against the city of New York to recover the sum of over \$262,000 for illuminating gas alleged to have been furnished to the defendant by the plaintiff for the purpose of lighting the public buildings and streets of the city. The price charged was at the rate of ninety cents per thousand cubic feet, and it is alleged on the part of the defendant that this was an excessive and unreasonable charge, considering the expense of producing it and allowing to the plaintiff a reasonable profit. An inspection of the pleadings discloses that this is the main, if not the only, defense to the action.

The gas was furnished, as is alleged, between the first day of January, 1903, and the 16th day of March, 1904. For several years prior thereto the plaintiff had supplied gas to the city, which service was rendered under written yearly contracts made through public lettings conducted under the provisions of the charter. A contract of that nature was made between the plaintiff and defendant for the year 1902, which expired January 1st, 1903. In December, 1902, the

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proper municipal officer, acting under the provisions of the charter, advertised for bids for the supply of gas for the year beginning January 1st, 1903, and ending December 31st of that year. The plaintiff made proposals in writing, wherein was specified the price, and submitted its bid according to the advertisement. Its bid was ninety cents per thousand cubic feet, but when the bid was opened a controversy seems to have arisen between the plaintiff and some of the municipal officers in relation to the price, and the result was that the bid was neither accepted nor rejected until about the 8th day of December, 1903; when the plaintiff was notified that the bids were rejected. No further attempt was made by the city to enter into a formal contract for the supply of gas, but it still continued to use and the plaintiff to supply the gas as before. This resulted in the controversy in question.

In February, 1906, the defendant presented a petition to the court praying that an order be granted allowing the defendant to make an inspection and inventory of the plaintiff's plant, an examination of its books, records and documents showing the cost of coal or other raw material, the wages and salaries paid, the amount of moneys invested and the present value of its plant, and all other items of expenditures and receipts pertaining to the cost of production and distribution of gas during the period in question, it being alleged that such facts were necessary as bearing on the question of the reasonableness of the charge. The court at Special Term denied the application, and the order was affirmed at the Appellate Division, but permission was given to appeal to this court, and two questions were certified for our consideration, viz.:

“(1) In this action can the defendant question the lawfulness of the price charged for the gas furnished and consumed by it on the ground that such price is in excess of the fair and reasonable value?”

“(2) Is the actual cost to the plaintiff of the production and distribution of the gas a material fact in the controversy?”

The answers to the questions certified depend upon the

construction of a statute, the material part of which is as follows: "In any city in this state having a population of eight hundred thousand or over, no corporation or person shall charge for illuminating gas a sum to exceed one dollar and twenty-five cents per thousand feet, and such gas shall have an illuminating power of not less than twenty sperm candles, or six to the pound, and burning at the rate of one hundred and twenty grains of spermaceti per hour, tested at a distance of not less than one mile from the place of manufacture, by a burner consuming five cubic feet of gas per hour, and shall comply with the standard of purity now or hereafter established by law; \* \* \*" (Transportation Corporations Law, L. 1890, ch. 566, sec. 70.)

The learned corporation counsel contends that this statute simply prescribes a maximum figure beyond which it is not lawful for the plaintiff to pass in presenting bills for gas; that it does not preclude the city in this action from contesting the question whether the price charged is reasonable or not, and that the city is entitled to show, if it can, by the proposed examination that the reasonable price of gas is much less than ninety cents per thousand cubic feet. We do not think that this contention can be sustained. Counsel have presented elaborate arguments on this question and numerous authorities have been cited, which need not be referred to. The question, we think, is a very simple one. The plaintiff is seeking to recover for gas furnished at the rate of ninety cents per thousand cubic feet, while the statute permitted it to charge more, if it thought wise to do so in a business sense. The legislature intended and did by this statute regulate the price of gas in the borough of Brooklyn. It established a maximum price which might be charged. Whatever price the legislature permitted the plaintiff to charge must be deemed to be reasonable and, hence, a charge of any sum below the maximum of one dollar and twenty-five cents must be deemed and taken to be a reasonable charge. When the price of a commodity is established by law it is not competent for the party purchasing it to resist payment on the ground

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that the law has permitted the seller to make an unreasonable charge. Hence, when the plaintiff furnished and the defendant received and used the gas the latter was precluded by statute from raising any controversy such as this with respect to the reasonableness of the charge; in other words, the charge must, in view of the statute, be deemed reasonable.

The order appealed from should be affirmed, with costs, and the questions certified answered in the negative.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ., concur.

Order affirmed.

**DONATO CITRONE, Respondent, v. O'ROURKE ENGINEERING CONSTRUCTION COMPANY, Appellant.**

**MASTER AND SERVANT — SAFETY OF WORKING PLACE — NEGLIGENCE.** The rule, that it is the duty of the master to furnish his servants with a reasonably safe place to work in, has no application when the danger to which his servants are exposed is due to the manner in which the work is prosecuted.

*Citrone v. O'Rourke Engineering Const. Co.*, 118 App. Div. 518, reversed.

(Argued April 19, 1907; decided April 30, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 13, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Theodore H. Lord* for appellant. The plaintiff and members of his gang were engaged in the construction of the trench at the time of the accident. Therefore the trench was not a place to work furnished by the defendant, and the complaint should have been dismissed. (*Hogan v. Smith*, 125 N. Y. 774; *Cullen v. Norton*, 126 N. Y. 1; *Perry v. Rogers*, 157 N. Y. 251; *Kimmer v. Weber*, 151 N. Y. 417; *O'Connell v. Clark*, 22 App. Div. 466; *Brown v. Terry*, 67 App. Div. 223; *Trapasso v. Coleman*, 74 App. Div. 33; *Vogel v.*

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*A. B. Co.*, 180 N. Y. 373; *Capasso v. Woolfolk*, 163 N. Y. 472.) The danger of working in this trench, in the absence of shoring from the top to the bottom, was an obvious risk assumed by the plaintiff. (*Kimmer v. Weber*, 151 N. Y. 417; *Marsh v. Chickering*, 101 N. Y. 396; *McCarthy v. Washburn*, 42 App. Div. 252; *Spencer v. Worthington*, 44 App. Div. 496; *Hempstock v. L. I. & S. Co.*, 98 App. Div. 332.)

*Thomas J. O'Neill* for respondent. Plaintiff was put to work in an unsafe place. (*Simone v. Kirk*, 173 N. Y. 16; *Finn v. Cassidy*, 165 N. Y. 584; *Doyle v. Baird*, 6 N. Y. Supp. 517; *Schmit v. Gillen*, 41 App. Div. 302.) The plaintiff was not guilty of contributory negligence, nor were his injuries caused by any risk which he assumed. (*Braunberg v. Solomon*, 102 App. Div. 332; *Rice v. E. P. Co.*, 174 N. Y. 398; *Alcott v. Kirkham*, 101 App. Div. 77; *N. P. R. R. Co. v. Babcock*, 154 U. S. 190; *Simone v. Kirk*, 173 N. Y. 9; *Swarts v. R. M. W. Mfg. Co.*, 100 N. Y. Supp. 1054; *Ward v. M. Ry. Co.*, 95 App. Div. 442; *Kiernan v. Eidlitz*, 100 N. Y. Supp. 733.)

WILLARD BARTLETT, J. The judgment which comes before us for review on this appeal is based upon the alleged negligence of the defendant corporation in failing to provide the plaintiff, who was a laborer in its service, with a reasonably safe place wherein to do the work which he was employed to perform. That work, considered as a whole, was the construction of a trench through earth and rock in the city of New York. It was prosecuted first by blasting and secondly by the removal of the blasted material. The plaintiff does not appear to have had anything to do with the blasting, but he and the gang of workmen to which he belonged would enter the portion of the trench already open after a blast had been fired and assist in removing the broken stone, sometimes breaking it up into smaller pieces to facilitate the process of removal. While engaged in this employment on September 13, 1904, he was injured by the fall upon him of some loose stones and earth from the sides of the trench. A small blast

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had previously been fired immediately before he began to work about two hours earlier on the same morning.

The theory of the plaintiff's case, as presented to the jury, was that the defendant was negligent in not protecting him and his fellow-laborers against such an accident as that which befell him, which could have been done by shoring or bracing up the sides of the trench so far as it had already been opened. At the place where the accident occurred the trench was about fourteen feet deep and six or seven feet wide and was being cut mostly through rock. There was shoring on the sides to the height of five or six feet from the bottom, but no further up. The question which the learned trial judge left to the jury on this branch of the case was thus stated in his charge: "Was this trench made reasonably safe for such work, considering the character of the work which was necessarily dangerous? In other words, was this trench where the plaintiff was employed made as safe as a trench where the work of excavating and blasting is carried on ordinarily is made by ordinarily prudent men?"

The jury must have answered these questions in the negative in order to find the verdict which they rendered in favor of the plaintiff; for they were expressly instructed by the court that they could not hold the defendant liable either for a failure to provide competent workmen to perform the work or for a failure to provide proper tools or appliances with which the work was to be done.

It was the contention of counsel for the defendant on the trial, and he contends here, that under the circumstances disclosed by the uncontradicted evidence the doctrine of the duty of a master to furnish his servant with a reasonably safe place to work in has no application to the case at bar. This point is distinctly raised by proper exceptions, and if well taken is fatal to the judgment.

In my opinion it is well taken. The evidence clearly shows that the work to be done was the construction of the trench. The learned trial judge so instructed the jury. As I have already pointed out, this work of construction was two-fold in

character and consisted of the blasting followed by the removal of the material. The gang of workmen to which the plaintiff belonged were fellow-servants with those engaged in the blasting. Precisely what that gang did appears from the testimony of another witness who belonged to it. "After a blast," he said, "we would be sent to clean out the stone that had been loosened by the blast. Wherever the stone fell after the blast was the place to which we went to clean it out; that is the way we were working. That is the kind of work that all the men in that gang were doing and some of them were breaking stone and some of them putting them up. He [the plaintiff] was working removing the stone that had been thrown out by some blast; he was there where they had blasted and we were cleaning it out. Immediately after the blast some of them would lift the stone from one bank to another and others would load cars. They would get these stones from down in the ditch wherever there was blasting."

It is apparent from this and all the other evidence in the case relating to the character of the work and the manner in which it was being conducted, that whatever was the danger to which the men were exposed it was due to the manner in which the work was prosecuted. The degree of safety near the head of the trench was constantly subject to change as the trench was extended. Under such circumstances, the rule of law which makes it incumbent upon an employer to provide or maintain a safe place in which his employees are to do their work has no application. As was said by Mr. Justice CULLEN in *O'Connell v. Clark* (22 App. Div. 466), "the principle of a safe place does not apply where the prosecution of the work itself makes the place and creates its danger," and by the same judge in *Stourbridge v. Brooklyn City R. R. Co.* (9 App. Div. 129): "The rule that the master must provide a safe place for work only applies where the work and the place are not connected; where the work is not in the construction of the place as in the case of a mill, a factory, mine, ship, well, etc." All those engaged in the master's service in effecting a common purpose are to be deemed fellow-servants,

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notwithstanding the fact that the work is done in successive stages, different parts thereof being devolved upon different persons, and the labor performed by one set of employees being prior in time to that performed by another set. (*Murphy v. Boston & Albany R. R. Co.*, 88 N. Y. 146. See, also, *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 215; *Neagle v. Syracuse, B. & N. Y. R. R. Co.*, 185 N. Y. 270.) If, therefore, the accident to the plaintiff was due to the carelessness of those who did the blasting this was the negligence of his fellow-servants for which the master could not be held responsible at common law, and the trial court ruled that the plaintiff was not entitled to go to the jury under the Employers' Liability Act, though for what reason does not appear.

The learned counsel for the respondent relies largely upon *Kranz v. Long Island Ry. Co.* (123 N. Y. 1) as an authority for the application of the doctrine of a safe place to the case at bar, but in the *Kranz* case and the other trench cases in which that doctrine has been held applicable, the person injured had nothing to do with the preparation of the trench in which the accident occurred. It was prepared not by him, but for him long before he began work therein and that work constituted no part of the construction of the trench itself. (See *Schmit v. Gillen*, 41 App. Div. 302.) In the present case, however, the plaintiff was engaged in the removal of material the removal of which was just as essential to the construction of the trench as was the preliminary blasting.

The opinions in the Appellate Division were devoted chiefly to the consideration of another and very interesting question relating to the plaintiff's assumption of risk growing out of the decision of this court in the case of *Rice v. Eureka Paper Co.* (174 N. Y. 385); but it is not necessary to consider that question now if the foregoing views are correct as they suffice to require a reversal of the judgment and a new trial, with costs to abide the event.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER and HISCOCK, JJ., concur.

Judgment reversed, etc.

## Statement of case.

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JAMES R. RUSSELL, Respondent, *v.* THE LEHIGH VALLEY RAILROAD COMPANY, Appellant.

1. **MASTER AND SERVANT—SAFETY OF WORKING PLACE—NEGLIGENCE—FALL OF EMBANKMENT.** Where one of a gang of workmen, employed by a railroad company under the direction of a competent foreman, in the excavation of a gravel bank with a steam shovel, which was moved forward on a temporary track as the bank was shoveled away, was injured by the caving in of an overhanging part of the bank, he cannot recover upon the theory that the company failed to furnish a safe place for its servants to work in, since the place where the men were to work changed from day to day, as the steam shovel moved on in its operations, and was necessarily such as the conformation of the embankment and the process of excavation made it; while the caving in of the embankment was an ever present possibility which required the exercise of active vigilance to guard against, the company had the right to delegate that duty to a foreman, and having furnished a concededly competent foreman, it is not liable for his negligence, or error in judgment, if any, in failing to perform that duty.

2. **WHEN FAILURE TO FURNISH EXPLOSIVES TO BREAK DOWN TOP OF OVERHANGING EMBANKMENT DOES NOT CONSTITUTE NEGLIGENCE OF MASTER.** The fact that the company had not furnished explosives, with the tools and other appliances provided, to break down the overhanging top of the embankment after the earth beneath had been taken away by the steam shovel, does not render the company liable where there is no evidence that explosives were demanded by the situation; that they were deemed necessary by the foreman, or would have been used by him, if furnished, and the evidence shows that no attempt was made before the accident, or at any other time, to pry off the top of the embankment with the tools and appliances furnished for that purpose; so that the negligence, if any there was, was that of the foreman, a fellow-servant of the plaintiff, and not that of the company.

*Russell v. Lehigh Valley R. R. Co.*, 112 App. Div. 903, reversed.

(Argued April 15, 1907; decided April 30, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 24, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

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*Eugene Diven* for appellant. The alleged negligence of the defendant in failing to supply explosives was not the proximate cause of the accident. (*Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 608; *Loughlin v. State*, 105 N. Y. 159; *Miller v. Thomas*, 15 App. Div. 105; *Perry v. Rogers*, 157 N. Y. 251; *Crown v. Orr*, 140 N. Y. 450; *Baker v. Sutton*, 11 App. Div. 271; *Maltbie v. Belden*, 167 N. Y. 307; *Naylor v. C. & N. Ry. Co.*, 53 Wis. 661; *Bell v. C. G., etc., Co.*, 36 App. Div. 242; *McCosker v. L. I. R. R. Co.*, 84 N. Y. 77.)

*Albert T. Wilkinson* for respondent. The defendant was negligent. (*Simone v. Kirk*, 173 N. Y. 13; *Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Ellis v. N. Y., L. E. & W. R. R. Co.*, 94 N. Y. 546; *Stringham v. Stewart*, 100 N. Y. 516; *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557.) Defendant's negligence was the proximate cause of the injury. (*Cone v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Rider v. S. R. T. Ry. Co.*, 171 N. Y. 139; *Kremer v. N. Y. E. Co.*, 102 App. Div. 433; *Murphy v. Leggett*, 164 N. Y. 121; *Phillips v. N. Y. C. & H. R. R. Co.*, 127 N. Y. 657; *Cohen v. Mayor, etc., of N. Y.*, 113 N. Y. 513; *Kunz v. City of Troy*, 104 N. Y. 344; *Ring v. City of Cohoes*, 77 N. Y. 83; *Lilly v. N. Y. C. & H. R. R. Co.*, 107 N. Y. 566.) The risk was not obvious and it cannot be said as a matter of law that the plaintiff assumed it. (*O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317; *Finn v. Cassidy*, 165 N. Y. 589; *Davidson v. Cornell*, 132 N. Y. 228; *Kain v. Smith*, 89 N. Y. 375; *Jenks v. Thompson*, 179 N. Y. 20; *Welle v. Celluloid Co.*, 175 N. Y. 401; *Witkowski v. Carter*, 60 App. Div. 577; *Griffin v. I. Ry. Co.*, 62 App. Div. 551; *Makin v. P. C. P. Co.*, 111 App. Div. 726; *Lynch v. A. L. Co.*, 113 App. Div. 502.)

GRAY, J. The injuries, because of which the plaintiff has brought this action, were sustained while in the defendant's employment and under the following circumstances. The

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defendant was operating a steam shovel for the removal of gravel and earth from a bank on one side of its main track. The car containing the shovel and its machinery was upon a temporary track, laid between the bank and the railway, and the work was in charge of a foreman; who, so far as it appears, was competent. The plaintiff came upon the work, while it was in progress and four days before meeting with his accident. His duty was to attend to one of the four jackscrews, which were placed under each corner of the shovel car and which served to keep it steady while the shovel was in motion. At the place where the accident occurred, the bank was about twenty-one feet in height, sloped gradually from the top and was composed of a thick layer of hard clay above, with loose earth, or gravel, below. When the bank was shovelled away, as far as the reach of the shovel ahead permitted, the temporary track was shifted on and the shovel car moved forward. In that way, the situation changed from day to day, at the rate of some twenty feet. Just prior to the accident, the plaintiff was directed by the foreman to attend to his jackscrew; which was upon the side of the shovel car next to the bank. He had tightened up his screw and was gathering up his "blocking," when, suddenly, the bank caved in and a part of the overhanging top fell upon him.

The plaintiff recovered a judgment against the defendant; which was affirmed by the Appellate Division, by a divided vote.

Negligence is, generally, charged against the defendant for the failure to furnish a safe place for the plaintiff to work in and suitable tools and appliances for doing the work of excavation. Particularly, it is insisted that the defendant was neglectful of the duty to furnish explosives, with which to break off, or to prevent, overhanging ledges, and the case was submitted to the jury upon that theory. The jurors were told, in effect, that the plaintiff's case depended upon the evidence establishing that the accident was the result of the lack of explosives.

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This was not a case for the application of the rule that the master must furnish a reasonably safe place. The place where the men were to work changed from day to day, as the steam shovel moved on in its operations. It was, necessarily, such as the conformation of the embankment and the process of excavation made it. The kind of work, which the men were employed to do, was such as to make the possibility of a fall of earth an ever present one and called for the exercise of active vigilance to guard against their being involved in it. The situation was one which made it the duty of the foreman to watch each supervening condition, during the progress of the work, and to warn the men. They were not excused themselves, of course, from being vigilant to observe conditions. The master's liability, in this case, is determined by common-law rules and is not predicated upon statute. If the defendant set the men at work under a competent foreman and with suitable appliances, it had performed its duty towards them and the execution of the details of the work could, properly, be intrusted to the judgment of the foreman. For his negligence, or for his mistakes in judgment, as to such, it could not be made liable for injurious results.

Now, with respect to the claim that the defendant is liable, because of its failure to furnish explosives, with the other tools and appliances in the car, it is clear that can, only, be a tenable one, provided the evidence disclosed that an emergency arose when it was judged that they were necessary and they could not be had. Experts were examined to show that explosives were used, in certain cases, to break away overhanging ledges and there was evidence that, at some time previously, the foreman had spoken of sending for dynamite. It may be assumed that, in this case, the use of explosives might have been efficient; but it was not shown that the foreman would have used them upon the occasion in question and it was not shown that there was any demand for them, or that they were deemed by him to be necessary. There were picks, bars and other tools; but there was no attempt to use them to pry off the top of the bank, then, or at any other time, as was shown to be a usual

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method. If they had been used, and had proved ineffectual for the purpose, it might then be claimed, with some force, that the men were inadequately provided with appliances. It was necessary, before the defendant could be charged with a neglect of duty, to show that efforts to change, or to improve, the situation had been rendered abortive through the insufficient supply of the means to meet it. There was nothing to show this to have been the case and if the occurrence is attributable to the omission of the foreman to make use of the tools at hand, or to procure further appliances, the fault was that of a fellow-servant and not of the defendant. A jury's speculation upon the situation cannot be allowed to affect the question of the master's liability. The performance of the work was committed to the foreman's supervision and judgment, and there is no complaint of his lack of skill. If he chose to operate his shovel, solely, upon the bank, when a better judgment would advise the resort to additional methods for breaking it down, the fault was his and not that of the defendant. If he failed to be watchful and omitted to warn the plaintiff, seasonably, of the peril, again, the latter suffered from the fault of his fellow-servant. The thing to be done at the time was a detail of the common work upon which all were engaged. The caving in of the bank was the result of the operation of the shovel. The ledge that fell was the condition of that day and not a condition that had existed, and the cause of its fall was the removal of the earth beneath.

The case is not within the authority of *Simone v. Kirk*, (173 N. Y. 7); which was, altogether, exceptional in its character. There, the laborer was killed by the fall of a projecting mass of material, under which he had been directed to work. The condition had existed for several days before he came upon the work; he was unacquainted with its condition and he was sent by the foreman to work under it in the night time and with but a dim light. The rule applicable to this case is to be found in the decisions of the cases of *Loughlin v. State of New York*, (105 N. Y. 159); *Perry v. Rogers*, (157 ib. 251) and *Capasso v. Woolfolk*, (163 ib. 472). In the last two of

these cases, the plaintiffs were injured by the falling of stones from the sides of a bank, or rock, which was being cut down by blasting operations. The judgments recovered by them were reversed by us, upon the ground that the removal of these stones was a detail of the work and the negligence of the foreman, in that respect, was that of a fellow-servant. What were details of the work the master had the right to intrust to a competent foreman and where the situation was, in the nature of things, a changing one, there was no continuing duty to provide a safe place for the workmen.

If there was negligence in this case, which was the cause of the plaintiff's injuries, it was that of his fellow-servant, the foreman, and that was a risk which he assumed when entering upon the employment.

I think that the judgment should be reversed and that a new trial should be ordered ; with costs to abide the event.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ., concur ; HISCOCK, J., takes no part.

Judgment reversed, etc.

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**ADELAIDE CLIFFORD, Respondent, v. DENVER AND RIO GRANDE RAILROAD COMPANY, Appellant.**

**EVIDENCE—WAIVER UNDER SECTION 836, CODE CIV. PRO., OF PROVISIONS OF SECTION 834, RELATING TO PATIENT'S SECRETS, BY TAKING PHYSICIAN'S DEPOSITION—WHEN SUCH ACT IS EQUIVALENT TO WAIVER ON THE TRIAL OR BY STIPULATION.** Section 836 of the Code of Civil Procedure, relating to waivers of the provisions of section 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, should be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action, and not to interpose an obstacle to the administration of justice by the suppression of facts already made public by the

patient himself in a legal proceeding. While the examination of a witness under a commission cannot be regarded for all purposes as a part of the trial, still the taking of privileged testimony to be used as evidence by either party is so much a part of it as to constitute a waiver made "on the trial;" and where interrogatories and cross-interrogatories are prepared and signed by the attorneys for the respective parties, calling for the precise information which the statute keeps secret unless waived, such acts also constitute a waiver by "stipulation of the attorneys of the respective parties;" the exclusion, therefore, as incompetent of the deposition of plaintiff's physician, offered in evidence by defendant, the plaintiff having failed to introduce it and objected to its introduction upon the ground that it divulged facts which the witness acquired in his capacity as physician, constitutes reversible error.

*Clifford v. Denver & R. G. R. Co.*, 111 App. Div. 513, reversed.

(Argued April 9, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 16, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Upon the trial of this action evidence was given tending to show that the plaintiff, while a passenger on a train of the defendant at Alamosa, Colorado, met with an accident caused wholly by its negligence. Whether she was injured internally was sharply contested. During the two nights immediately following the accident she assisted in the performance of a theatrical company, of which she was a member, acting a juvenile part, which required her "to dance quite a good deal." At the close of the performance on the second night, according to her testimony, she fell upon the stage, and after that could work no more for many months. The jury found a substantial verdict in her favor, and the judgment entered thereon was affirmed by the Appellate Division, two of the justices dissenting. The defendant appealed to this court.

*Rush Taggart* and *F. C. Nicodemus, Jr.*, for appellant. The plaintiff waived her privilege under sections 834 and 836 of the Code of Civil Procedure in procuring Dr. Hanson's deposition, and, therefore, his evidence was competent.

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"The patient cannot use this privilege both as a sword and a shield." (*McKinney v. G. S., etc., R. R. Co.*, 104 N. Y. 352; *Morris v. N. Y., O. & W. R. Co.*, 148 N. Y. 88; *Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 78; *Matter of Coleman*, 111 N. Y. 77; *Powers v. M. S. Ry. Co.*, 105 App. Div. 358; *Cohen v. C. L. Ins. Co.*, 9 J. & S. 296; *Rousseau v. Bleau*, 131 N. Y. 107; *Marx v. M. S. Ry. Co.*, 56 Hun, 575; *People v. Ballard*, 134 N. Y. 303.)

*Isaac N. Jacobson* and *David May* for respondent. The respondent did not waive the privilege accorded to her by section 834 of the Code of Civil Procedure. (Code Civ. Pro. § 836; *Cudlip v. N. Y. E. J. Pub. Co.*, 180 N. Y. 85.)

VANN, J. Five days after the plaintiff was injured she went to St. Mary's Hospital in Grande Junction, Colorado, where she was treated by Dr. Hanson, a physician and surgeon. After issue was joined she caused a commission to be issued for the examination of the doctor as a witness in her behalf. Interrogatories prepared by her counsel and cross-interrogatories prepared by the counsel for the defendant were annexed to the commission, which was duly executed and returned. The plaintiff rested without reading any part of the testimony thus taken, but when the case was with the defendant its counsel offered the deposition in evidence and was permitted to read the answers to the first four direct interrogatories, which showed that the witness was a physician and surgeon and that he attended the plaintiff for four or five days while she was in the hospital. The answers to the rest of the direct interrogatories and to the most of the cross-interrogatories were objected to by the plaintiff and excluded as incompetent, because the witness divulged "facts which he acquired in his professional capacity as physician to the plaintiff."

The direct interrogatories called upon Dr. Hanson to state whether he examined the plaintiff and what the examination disclosed; whether she was suffering from injuries and if so to describe them; whether she complained of pain and if so

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of what kind; if she was suffering from shock, to describe the same fully and in detail; whether from the information thus acquired he could state with reasonable certainty that the injuries were of a permanent nature, etc., etc.

The cross-interrogatories objected to called on the witness to state whether the plaintiff complained of any pain other than that caused by pleurisy; if there was any trouble except pleurisy, to state its nature; if she was suffering from inflamed ovaries, whether such a condition could result from an external blow or shock so slight as to leave no external sign of injury, etc., etc. Each question of both series was read by itself and each ruling excluding the answer upon the ground stated was separately excepted to.

The Revised Statutes formerly provided and the Code of Civil Procedure now provides that a physician "shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." (3 R. S. [6th ed.] p. 671, § 119; Code Civ. Pro. § 834.)

The Revised Statutes, however, did not provide whether or when or how the patient could waive his right to object to the disclosure. The first provision that we find relating to that subject appeared in the Code of Civil Procedure, as first enacted, which provided that the prohibition should "apply to every examination of a person as a witness, unless" it was "expressly waived" by the patient. (L. 1876, ch. 448; L. 1877, ch. 416, § 836.)

In 1891 it was provided that the prohibition against disclosure should "apply to any examination of a person as a witness unless the provisions thereof are expressly waived on the trial or examination" by the patient. A physician was further authorized to disclose certain information, somewhat limited in character, acquired in attending a patient since deceased, "when the provisions of section 834 have been expressly waived" on the "trial or examination by the personal representatives of the deceased patient." (L. 1891, ch. 381.)

An amendment made in 1892 is not now important, but for convenience of examination we cite the Laws of 1892, ch. 514.

In 1893 the right to expressly waive the restriction was extended when the patient was deceased to "the surviving husband, widow or any heir at law or any of the next of kin." The following provisions were added: "But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. In an action for the recovery of damages for a personal injury the testimony of a physician or surgeon attached to any hospital, dispensary or other charitable institution as to information which he acquired in attending a patient in a professional capacity, at such hospital, dispensary, or other charitable institution shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion may, notwithstanding such deposition, order that a subpoena issue for the attendance and examination of such physician or surgeon upon the trial of the action." (L. 1893, ch. 295, amending Code Civ. Pro. sec. 836.)

In 1899 the section was left unchanged except that the following addition was made thereto: "The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may, prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor." (L. 1899, ch. 53.)

In 1904 sections 834 and 836 were so amended as to extend the provisions thereof to professional or registered nurses, but no other change was made. (L. 1904, ch. 331.)

Thus legislation, starting with no regulation upon the subject of waiver, in 1877 allowed an express waiver, in 1891

an express waiver "upon the trial or examination," and since 1899 an express waiver "upon the trial or examination" when made in open court, with no right to waive, by a paper executed prior to the trial, except by the stipulation of the attorneys for the respective parties. The prohibition applies "to any examination of a person as a witness," unless it is waived as thus provided.

It must be conceded that the language of the statute now in force, when read by itself, is broad enough to justify the rulings of the trial court. However, in order to learn the meaning of a statute which has been frequently amended, it is not always enough to read the statute alone without searching for the reasons which led to the various amendments. When a law works well and satisfies the judgment of the bar and the public, there is no occasion for change; but when something has been overlooked and the defect is discovered by the practical test of litigation, the legislature is apt to respond. Changes in legislation upon a subject, therefore, should be studied in connection with the decisions of the courts relating thereto, so as to see whether the action of the courts led to the action of the legislature and thus to interpret the command of the statute in the light of the evil it sought to remedy.

Even under the Revised Statutes it was held that although the rule was peremptory, still as it was made for the benefit of the patient he could waive it and allow the physician to testify. (*Cahen v. Continental Life Ins. Co.*, 9 J. & S. 296, 304.)

During the long period when an express waiver was allowed, but no method was prescribed, the courts upheld any method by which the patient clearly expressed an intention to waive his right to object. Acts under some circumstances, silence under others, declarations both verbal and written, upon the trial and in advance of it, were held sufficient. We cite a few of the earlier cases to illustrate the subject before we come to those decisions which, as we think, induced the legislature to make the changes relied upon by

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the respondent to sustain the rulings in question. (*Matter of Coleman*, 111 N. Y. 220, 227; *Hoyt v. Hoyt*, 112 N. Y. 493; *Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 77, 85; *Masterton v. Boyce*, 6 N. Y. Supp. 65, 69; *Marx v. Manhattan Ry. Co.*, 10 N. Y. Supp. 159; *Matter of Freeman*, 46 Hun, 458, 463.)

In the course of time certain corporations insisted upon written waivers in contracts of life insurance made long in advance, as it was expected, of the death of the insured. Thus in a case decided in 1894 the application, which was made a part of the contract, contained the following stipulation: "And for myself and for any person accepting or acquiring any interest in any benefit certificate issued on this application, I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity, or otherwise, or rendering him incompetent as a witness in any way whatever, and I hereby consent and request that any such physician testify concerning my health and physical condition, past, present and future." It was held that such a waiver was effective and had reference to a trial after the death of the insured, as there could be no occasion to use it until then. (*Foley v. Royal Arcanum*, 78 Hun, 222, 227.)

In 1895 the same court held the same way in a case where it was agreed in an application for life insurance that "the provisions of section 834 of the Code of Civil Procedure of the State of New York and of similar provisions in the laws of other states, are hereby waived, and it is expressly consented and stipulated that in any suit on the policy herein applied for, any physician who has attended or may hereafter attend the insured, may disclose any information acquired by him in any wise affecting the disclosures and warranties herein made." (*Dougherty v. Metr. Life Ins. Co.*, 87 Hun, 15, 17.)

In deciding the case last cited the court said: "The statute imposed silence upon the physician for the protection of the

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patient. The legislature locked up the secret and gave the key to the patient. He can forego the privilege and unlock the mouth of the doctor. The statute requires that to be done expressly upon the trial, but there is no method prescribed for the accomplishment of the object. \* \* \* The reasonable construction of the statute, therefore, is that the provisions are expressly waived upon the trial if a proper stipulation to that effect be produced thereat and entered upon the record regardless of the time when the waiver was executed."

A similar stipulation in an application for a policy considered by one of the Federal courts in 1888 was held to be binding on the beneficiary. The court said: "As the patient is at liberty to waive the privilege which the law affords him, it appears to me that it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative." (*Adreveno v. Mutual Reserve Fund Life Assoc.*, 34 Fed. Rep. 870.) While this court took a different view when the question reached it, that was not until after the amendment of 1899 had been passed. (*Holden v. Metr. Life Ins. Co.*, 165 N. Y. 13, reversing 11 App. Div. 426.)

In the meantime it seemed clear, inasmuch as four courts had held a waiver by contract good, that in a short time no policy of life insurance would be written unless a waiver of the statute was made part of the contract, and, hence, the legislature provided that the waiver "must be made in open court on the trial of the action or proceeding and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver." It added, however, that "the attorneys for the respective parties" might "prior to the trial stipulate for such waiver." The

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object of the amendment, in our judgment, was to meet the situation created by the underwriters and these decisions, by preventing the virtual repeal of the statute as to an extensive class of contracts. (*Holden Case, supra.*) But one act was specified in the limitation, and that was the execution of a paper by a party before the trial. Clearly, the legislature did not mean that the patient could not waive the statute by calling the physician and examining him at the trial, or by not objecting if the other party called him. We think it was not intended, in the absence of any specification to that effect, to prevent other acts from constituting a waiver when the necessary result thereof would take the case out of the spirit of the statute. The object of section 834 is to prevent the disclosure of delicate and confidential matters, which might humiliate the patient in his lifetime and disgrace his memory when dead, so as to enable him to consult a physician in safety, knowing that his lips would be sealed by the law until he, himself, removed the seal. When, however, the patient forces the physician to tell all he knows upon the subject, and thus publishes to the world all that he might have kept secret, he no longer needs the protection of the statute and withdraws himself from the spirit of the prohibition. That is the logical and necessary effect of such an act, and if the legislature had intended to prevent that result we think it would have said so in specific terms.

The subject is illustrated by a case decided in this court prior to the amendment of 1899, in which it appeared that the plaintiff had sued a railroad company to recover damages for personal injuries, and upon the first trial of the action she called her attending physician, who testified as to all the facts bearing upon her physical condition learned by him while treating her, but upon the second trial, when the same witness was called by the defendant to testify to the same facts, his evidence was excluded. This court, however, held that the evidence should have been received, and the judges, with one exception, united with Chief Judge RUGER in saying: "The patient cannot use this privilege both as a sword and a shield,

to waive when it inures to her advantage and wield when it does not. After its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot be again hidden or concealed. It is then open to the consideration of the entire public and the privilege of forbidding its repetition is not conferred by statute. The consent having been once given and acted upon cannot be recalled and the patient can never be restored to the condition which the statute, from motives of public policy, has sought to protect." (*McKinney v. Grand Street, P. P. & F. R. R.* 104 N. Y. 352, 355.)

In another case, decided in 1895, it was held, as correctly stated in the head note, that "when a party who has been attended by two physicians in their professional capacity at the same examination or consultation, both holding professional relations to him, calls one of them as a witness in his own behalf in an action in which the party's condition as it appeared at such consultation is the important question, to prove what took place or what the witness then learned, he thereby waives the privilege conferred by section 834 of the Code of Civil Procedure and loses his right to object to the testimony of the other physician if called by the opposite party to testify as to the same transaction." Judge O'BRIEN wrote for all the judges as follows: "In this case it was the privilege of the plaintiff to insist that both physicians should remain silent as to all information they obtained at the consultation, but she waived this privilege when she called Dr. Payne as a witness and required him to disclose it. The plaintiff could not sever her privilege and waive it in part and retain it in part. If she waived it at all it then ceased to exist, not partially but entirely. The testimony of Dr. Payne having been given in her behalf every reason for excluding that of his associate ceased. The whole question turns upon the legal consequence of the plaintiff's act in calling one of

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the physicians as a witness. She then freely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained." (*Morris v. N. Y., O. & W. Ry. Co.*, 148 N. Y. 88, 92.)

The amendment of 1899 must be read in the light of the object of the statute which was to prevent the disclosure of a patient's secrets against his will, not to interpose an obstacle to the administration of justice by suppressing facts already made public by the patient himself in a legal proceeding. The legislature did not intend to allow a party to cause a record to be made and filed in a public office in which the testimony of his physician, taken at his instance, is set forth at large, stating confidential facts material in a controversy with another party, and then to prevent that evidence from being read before the jury by advancing as his only objection that it would divulge private matters. The language of the section limiting waivers to such as are made in open court on the trial of an action or by the stipulation of the attorneys for the respective parties should be so construed as to promote, not to defeat the purpose of the statute. While there is no doubt that the examination of a witness under a commission cannot be regarded for all purposes as part of the trial, still the taking of testimony to be used as evidence by either party may well be regarded as a part thereof so far as it affects the question now before us. The application for a commission is made in open court, to take evidence to prove or disprove the issue. It is a proceeding authorized by law to compel a witness to give evidence to be used in deciding the case. Although preliminary to the formal trial in point of time, in substance it may be held so much a part of the trial as to comply with the amendment of 1899, passed for the purpose, already pointed out, of preventing waivers by contract made long before the commencement of the action.

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(*Schlotterer v. Brooklyn & N. Y. Ferry Co.*, 89 App. Div. 508, 510; *Cole v. Sweet*, 187 N. Y. 488.)

Moreover, when the plaintiff moved for a commission to examine Dr. Hanson, her attorneys either signed a notice of motion or a stipulation for that purpose. Interrogatories were prepared and signed by her attorneys, calling upon the witness to disclose, in full, information which he had acquired while attending her in a professional capacity. Cross-interrogatories were prepared by the other party at some expense and annexed to the commission. I think that the attorneys for the respective parties thus stipulated a waiver of section 834 as permitted by section 836, for they signed papers, in a legal proceeding taken in the action, which could have no practical effect unless they operated as a waiver. Neither the form nor the contents of the stipulation is prescribed and hence whatever shows a clear intention to surrender the protection of the statute is sufficient. Interrogatories asking the doctor to tell what his examination of the plaintiff disclosed, to describe her injuries and the like, show an unmistakable intention to make public all the information that he had acquired in attending her. A voluntary disclosure of the privileged testimony is conclusive evidence of an intention to waive the privilege. The questions could not be answered without making a full disclosure and hence they necessarily show that to have been the intention, which is the essence of a waiver. If the plaintiff could thus, through what may fairly be held to be the stipulation of her attorneys, force the doctor to give evidence and could then object to such evidence being used in the only way authorized by law, she could mock the court and bring ridicule upon its process with impunity. The courts should not permit their remedies to be trifled with, nor at the election of one party and to the injury of the other, turned into a vain and empty ceremony. The necessary effect of signing the various papers for the commission, including the direct and cross-interrogatories calling specifically for the precise information which the statute keeps secret unless waived, as I think, constitutes a waiver of the prohibition by the stipu-

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lation of the attorneys for the respective parties. Upon this ground I base my vote for reversal.

The judgment should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, EDWARD T. BARTLETT, HAIGHT and CHASE, JJ., concur; CULLEN, Ch. J., and HISCOCK, J., concur on the ground first stated in the opinion.

Judgment reversed, etc.

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In the Matter of the Application of THE LONG ACRE ELECTRIC LIGHT AND POWER COMPANY, Respondent, for a Writ of Mandamus against THE CONSOLIDATED TELEGRAPH AND ELECTRICAL SUBWAY COMPANY, Appellant.

1. CORPORATIONS—SALE OF FRANCHISE BY RECEIVER TO AN INDIVIDUAL. The sale of the franchise of an insolvent electric company to an individual, made at public auction by the receiver, vests in the purchaser all the rights conferred by the original franchise.

2. VOLUNTARY ASSIGNMENT OF FRANCHISE BY CORPORATION TO AN INDIVIDUAL—NEW YORK ELECTRICAL SUBWAY COMPANY. The validity of a voluntary assignment by an electrical company of its franchise to an individual acting as a conduit to transmit the title to another corporation about to be formed and to which he thereafter assigned it, cannot be successfully questioned by the New York Electrical Subway Company upon an application for space in the subway by the holder of the franchise.

3. MANDAMUS TO COMPEL GRANTING OF SPACE IN SUBWAY—CONSENT OF COMMISSIONER OF ELECTRICITY NEED NOT PRECEDE APPLICATION FOR SPACE. The applicant may mandamus the Subway Company upon its refusal to assign space and it is not necessary that the consent of the commissioner of water, gas and electricity to place its conductors in the subway should precede the application to the company.

*Matter of Long Acre El. L. & Power Co.*, 117 App. Div. 80, affirmed.

(Argued April 4, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 18, 1907, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to assign to the petitioner space in its subways for electrical conductors.

The facts, so far as material, are stated in the opinion.

Points of counsel.

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*Alton B. Parker* and *Henry J. Hemmens* for appellant. The attempted grant of the franchise by the American Electric Manufacturing Company in 1888 to an individual was illegal and invalid and no title passed thereby, hence the respondent, which claims under and through it, is not an authorized company and has no lawful power to operate electrical conductors in the streets, avenues and highways of the city of New York. (*Matter of B. E. R. R. Co.*, 125 N. Y. 434; *B. S. T. Co. v. City of Brooklyn*, 78 N. Y. 524; *Farnham v. Benedict*, 107 N. Y. 159; *People ex rel. Hearst v. Ramapo*, 51 App. Div. 145; *A. G. L. Co. v. Aspen*, 37 Pac. Rep. 728.) The respondent is not a lawfully authorized company. It has no special or secondary franchise and, therefore, the appellant cannot under the statutes and contracts accord space to it in its ducts. The franchise of the American Electric Manufacturing Company could not pass from that company to an individual such as Townsend by the pretended grant. That franchise is not vested in the respondent who claims through Townsend, but is still vested, if it ever vested at all, in the American Electric Manufacturing Company. The pretended assignment to Townsend was against public policy. The state, the source from which the franchise came, never vested in Townsend or in Minturn the power either to receive or operate said franchise. This objection applies to each of the attempts to transfer the franchise to an individual. (*Hays v. Ottawa, etc.*, 61 Ill. 422; *Tippecanoe v. L., etc., Co.*, 50 Ind. 35; *Anderson v. C. S. R. Co.*, 86 Ky. 44; *Com. v. Smith*, 10 Allen, 448; *Richards v. M. R. R. Co.*, 44 N. H. 127; *S. C. Co. v. Bonham*, 9 Watts & S. 27; *I., etc., R. Co. v. Eckford*, 71 Tex. 274; *Acker v. A., etc., R. Co.*, 84 Va. 648; *Gibbs v. Con. Gas Co.*, 130 U. S. 396; *MacGregor v. D., etc., R. Co.*, L. R. [18 Q. B.] 618.) The appellant has the right to refuse to allot space in its subways to an unauthorized company. It can object to respondent's claims. (*B. E. I. Co. v. C. T. & E. S. Co.*, 60 Hun, 446; *Zanesville v. G. L. Co.*, 47 Ohio St. 1; *Allen v. Clausen*, 114 Wis. 244; *N. O. G. L. Co. v. L. L. & H. Co.*, 11 Fed. Rep. 277; *Ghee v.*

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*N. U. Gas Co.*, 158 N. Y. 510; *Lamming v. Galusha*, 81 Hun, 247; *Eaton v. Aspinwall*, 19 N. Y. 119; *O. R. R. Co. v. Oakland*, 45 Cal. 365.) No title to the alleged franchise passed at the receiver's sale. (Code Civ. Pro. § 1242.) Under the charter of Greater New York and the rules and regulations of the department of water supply, gas and electricity, made pursuant thereto, the respondent should, in the first instance, have applied to that department for a permit to be allowed to draw its cables in the appellant's ducts, or for the construction of new subways, if there were not sufficient already constructed to accommodate its conductors. (L. 1887, ch. 716; *Matter of Subway Co. v. Monroe*, 85 App. Div. 542; *Matter of M. & B. E. Co.*; 47 Misc. Rep. 209.)

*Charles F. Brown, A. J. Dittenhoefer and David Gerber* for respondent. The claim that before the relator can open the streets in order to lay its wires it must secure a permit from the commissioner of water supply, gas and electricity is not an answer to this application to have a place assigned. (*W. S. E. Co. v. C. T. Co.*, 110 App. Div. 171; *People ex rel. N. Y. E. L. Co. v. Ellison*, 115 App. Div. 254; *Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248.) The objection that a franchise involving the performance of public duties is not assignable without the consent of the public authorities can be taken only by the state or by some duly authorized public officer. It cannot in this proceeding be invoked by the appellant. (*Starin v. Edson*, 112 N. Y. 206; *Rainey v. Laing*, 58 Barb. 453; *Nat. Bank v. Matthews*, 98 U. S. 621; *Nat. Bank v. Whitney*, 103 U. S. 99; *Smith v. Cornelius*, 41 W. Va. 59; *Ayers v. S. A. B. Co.*, L. R. [3 P. C.] 548; *B. G. L. Co. v. Claffy*, 151 N. Y. 24; *Commonwealth v. Ins. Co.*, 5 Mass. 230; *People v. U. Ins. Co.*, 15 Johns. 358; Thomp. on Corp. §§ 6030, 6033; Cook on Corp. §§ 632, 637.) The assignment made by the American Electrical Manufacturing Company to Frederick E. Townsend and the subsequent transfers of the franchise by which the title thereto was vested in the relator were not

void. Such transfers were valid between the parties to the respective contracts and transferred title to the relator, and the only legal defect that can possibly be claimed to exist in them is that they were voidable at the election of the state or the city. (*Parker v. E. G. & N. R. R. Co.*, 165 N. Y. 247; *Minor v. E. R. R. Co.*, 171 N. Y. 573; *Woodruff v. E. R. R. Co.*, 93 N. Y. 609; *Abbott v. J. R. R. Co.*, 80 N. Y. 27; *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *B. G. Co. v. Claffy*, 151 N. Y. 24; *Palmer v. C. H. Cemetery*, 122 N. Y. 435; *H. & G. Mfg. Co. v. H. & W. M. Co.*, 127 N. Y. 252; *Sistare v. Best*, 88 N. Y. 527; *Kent v. Q. M. Co.*, 78 N. Y. 159.)

O'BRIEN, J. This case presents a controversy between two corporations, which assumes the form of an application for a peremptory writ of mandamus. The application was granted and the order affirmed on appeal. There is no controversy about the facts, but there is in regard to the law governing the case. The corporate powers and duties of the defendant may be described in general terms without specific references to the contract and legislative acts conferring upon it, as it is claimed, the powers which it is authorized and bound to exercise. It has authority, and it is its duty, to construct and maintain conduits for carrying wires for other corporations authorized to operate electrical conductors in the city of New York. In this discussion it will be called the Subway Company. It is its duty to lease and allot space to any corporation "having power to operate electrical conductors in any street, highway or public place in the city of New York that may apply for the same, including any company or corporation having, or which shall acquire, lawful power to manufacture, use or supply electricity." The statute also provides that mandamus may issue if the defendant should refuse or fail to perform the duties and obligations assumed by it. (Laws of 1887, ch. 716, section 7.)

The relator applied to the defendant with a request that it assign to it space in the subway for its electrical conductors.

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The request was refused and hence the application for a writ of mandamus and the controversy presented by this appeal. The refusal was, mainly, on the ground that the relator was not authorized to operate electrical conductors in the city, and the origin and history of the relator and the franchise in question are very important in considering that question. In March, 1885, a corporation was created to operate electrical conductors in the city of New York which, for brevity, will be called the American Company. In May, 1887, the municipal authorities of the city granted to this corporation a franchise to locate and erect poles and hang wires and fixtures thereon and place, construct and use wires, conduits and conductors for electrical purposes in, over and under the streets. In 1888 this corporation, having accepted the franchise, assigned it to another corporation which, for brevity, will be called the Illuminating Company. The assignment was not made directly to that company, but to one Frederick E. Townsend, on April 18th, 1888. On the 29th of December, 1888, Townsend and two other persons filed a certificate by which the Illuminating Company was created; Townsend, obviously, being a mere conduit for transmission of the title of the American Company to the Illuminating Company, assigned the franchises to the new corporation. The defendant's contention is that this transaction constitutes a defective link in the relator's chain of title to the original franchise.

In 1889, the Illuminating Company commenced operations under the franchise so acquired by erecting poles and wires, and supplied to the public electric lights to the extent to which its facilities were equal, and continued to do so for more than a year and until its poles and wires were cut down and removed by the municipal authorities, in conjunction with a legislative board, possessing the power to cause all overhead wires to be removed and placed underground. It seems that at that time there were no subways for the reception of electrical conductors in that part of the city and the Illuminating Company became incapacitated from fully providing for its customers; but for a considerable time after its

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poles were removed it continued to furnish lights in the building where its station was located and to other customers in the same block. The destruction of its property resulted in financial embarrassment, and in or about October, 1897, a judgment creditor instituted sequestration proceedings against the corporation and a receiver was appointed. After judgment, in November, 1897, the court directed the receiver to sell the franchise at public auction to the highest bidder, and the receiver thereupon sold it to one Minturn, which sale was duly confirmed by the court. In March, 1906, Minturn assigned it to the relator. The relator was incorporated in April, 1903, and was authorized to "manufacture, generate, transmit, furnish, supply and distribute electricity for light, heat, power or other purposes, and to light by electricity streets, avenues, parks, public and private buildings," etc., in the city of New York.

The defendant's principal contention is that the franchise granted by the municipal authorities to the original American Company has not passed to the relator, and that although it possesses certain powers under its certificate, it has no power to compel the defendant to allot to it space in the subway; not being a corporation authorized to operate electrical conductors.

It seems to me to be very clear that the transfer to Minturn under his purchase at the receiver's sale vested him with all the rights conferred by the original franchise. It cannot be disputed that a franchise to operate electrical conductors in the streets is property, taxable, alienable, subject to levy and sale under execution and to condemnation under the exercise of the power of eminent domain. (*People v. O'Brien*, 111 N. Y. 1.) So the defendant's objection must, we think, be confined to the transfer to Townsend, which was voluntary, though obviously made to transmit the rights acquired by the original company to another corporation about to be formed and which was, in fact, formed. The question, so far as concerns that transfer, is whether the original American Company had the power, by a written assignment, to vest in him the

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property right to use the streets theretofore acquired from the municipality. But if it should be assumed that the right to this secondary franchise could not be transferred to an individual the defendant would still have to meet and overcome the objection that such a question could only be raised by the state or by the municipality. If the company has been guilty of an act *ultra vires* the state might perhaps proceed against it for a forfeiture of its franchise, or the city might, if the question was properly presented, avail itself of it; but it is not open to the defendant to raise the question in this proceeding. It can be of no concern to the defendant whether the relator, deriving its title as stated, or the original company applied for space in the subway. (*Starin v. Edson*, 112 N. Y. 206; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Ayers v. South Aus. Banking Co.*, L. R. [3 P. C.] 548; *Beth Gas Light Co. v. Claffy*, 151 N. Y. 24; *Commonwealth v. U. F. & M. Ins. Co.*, 5 Mass. 230.) In Thompson on Corporations (Sec. 6030) the principle is stated as follows: "Where a contract of a corporation has been executed by the parties to it it is not competent for a mere stranger to the contract to assail it and deprive the corporation of the advantage from it upon the ground that it was interdicted by the charter; and in general it may be said that one whose rights are not injuriously affected by reason of the fact that a corporation is acting in excess of its powers or beyond the warrant of law has no standing in court to complain of the same. These considerations bring us to the somewhat new and growing doctrine that whether a corporation has acted in excess of its granted powers or in the face of an expressed or implied statutory prohibition is one which cannot be raised in litigation between it and a private party, or between private parties, but can only be raised by the state in a direct proceeding either to forfeit the franchise of the corporation or to subject it to punishment for doing the unlawful act." (Id. sec. 6033.) In this view of the case it is not necessary to go into any extensive examination of the legal question, so ably discussed by counsel, claiming that the cor-

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poration to which the secondary franchise was granted was powerless to transfer its rights to an individual.

Considering the condition of the law in this state to-day, concerning the power of a corporation to transfer secondary franchises to an individual, I think it would not be wise to hold that such a transfer is void. The power to mortgage its franchise would seem necessarily to include the power to sell and dispose of it. The American Company, which procured the franchise, was incorporated under the General Manufacturing Act of 1848, which gave to corporations organized under it power to hold, purchase and *convey* real and personal property. The franchise being property it could be transferred through the execution of a mortgage; and I am unable to discover any reason why an individual could not purchase any personal property covered by the mortgage. Chapter 638, Laws of 1893, confers power on corporations, other than railroad corporations, to sell and convey their franchises to other corporations. While this statute does not apply to the assignment in question it indicates the public policy of the state. There can be no doubt that in some of the text books, as well as in some of the adjudged cases, expressions may be found which would seem to support the broad doctrine that such a transfer by a corporation to an individual is absolutely void and of no more force than if it had never been made. But whatever may have been the law originally on this question, such a doctrine has long been practically ignored in this state. The text books also recognize the fact that the drift of authority has been in the direction of sanctioning transfers such as was made to Townsend in this case. Many of the cases where the courts have recognized and sanctioned such transfers do not appear to have been based on any special statute authorizing it. As was said by Judge RUGER in *Woodruff v. Erie Ry. Co.* (93 N. Y. 609): "The transfer to an individual may not be expressly authorized by statute, but neither is it expressly prohibited, and the validity of such a transfer, granting the power to make it, is recognized by chapter 582 of the Laws of 1864. We have carefully examined the several

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cases cited by the learned counsel for the respondent, in support of the claim that the lease to the plaintiff was contrary to public policy and, therefore, void, and do not think them applicable to the condition of the law as it exists in this State." Judge ANDREWS, in *Bath Gas Light Co. v. Claffy* (151 N. Y. 24), says: "We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void; but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent and that its recovery may be enforced by action on the covenant." In that case the validity of a lease by one lighting company to another was under consideration.

We think that the assignment made by the American Company to Townsend, and the subsequent transfer of the franchise by him to another corporation, did not constitute a defense to the relator's application for the writ or its right to exercise the franchise. The most that can be claimed for the transaction is that it was voidable at the election of the state or city. (*Woodruff v. Erie Ry. Co., supra*; *Parker v. Elmira C. & N. R. R. Co.*, 165 N. Y. 274; *Minor v. Erie R. R. Co.*, 171 N. Y. 573; *People v. O'Brien, supra*; *Bath Gas L. Co. v. Claffy, supra*; *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 435; *Holmes & G. Mfg. Co. v. H. & W. Metal Co.*, 127 N. Y. 252.)

The contention is also made in behalf of the defendant that the relator should, in the first instance, have applied to the municipal department having control of the supply of water, gas and electricity for permission to place its conductors in the subway, and hence that the application for the writ was premature. It is, no doubt, true that the relator must procure such a permit at some time; otherwise the subway cannot be uncovered to receive the cables, or the street interfered with. It is not necessary, however, that the application for such a permit must precede the application to the defendant to assign space. Under the rules governing the municipal department having charge of the water supply, gas and electricity it is provided that "when applications have been made and space

assigned for conduits under ground the written consent of the commissioner must be obtained before any conductors are placed in the space so assigned." It would be useless for the relator to make an application for a permit to open the subway and interfere with the street until it was first determined whether it could use the subway for its conductors. Indeed, the commissioner, on refusal, could not be compelled to uncover the subway or interfere with the street until the right involved in this application was first determined. (*People ex rel. N. Y. Electric Lines Co. v. Squire*, 107 N. Y. 593.)

There are some minor questions in the case which have been discussed by counsel, but they seem to have been correctly disposed of in the courts below and it is not needful to refer to them here. The legal obstacles urged against the relator have been examined and we think they are not tenable, or sufficient to defeat the relator's application.

The order appealed from should be affirmed, with costs.

EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ. concur; CULLEN, Ch. J., and VANN, J., not voting.

Order affirmed.

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In the Matter of JACOB MELENBACKER, Appellant, v. VILLAGE  
OF SALAMANCA et al., Respondents.

**STREETS — CHANGE IN GRADE TO ABOLISH RAILROAD CROSSING — OWNER OF PREMISES INJURED THEREBY MUST FILE NOTICE OF CLAIM FOR DAMAGES WITH BOARD OF RAILROAD COMMISSIONERS WITHIN SIX MONTHS AFTER COMPLETION OF WORK.** Where the grade of a village street has been changed pursuant to an order of the board of railroad commissioners for the purpose of abolishing a grade crossing, under the provisions of the Railroad Law (L. 1890, ch. 565, § 62, as amd.), an abutting property owner, whose premises have been injured by such change of grade, cannot recover damages therefor where he has failed to file a notice of claim for such damages with the board of railroad commissioners, within six months after the completion of the work, in compliance with section 65 of the Railroad Law (L. 1890, ch. 565, § 65, as amd. by L. 1900, ch. 517), notwithstanding a notice of such claim was filed with the clerk of the village, within sixty days after the completion of the work, in conformity with the statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894,

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ch. 172), providing when damages caused by a change in the grade of a street in an incorporated village shall be paid by the municipality, since the latter statute must be read in connection with the sections of the Railroad Law by which the change of grade in question was expressly authorized and under which the damages must be paid by the railroad company, the municipality and the state in certain proportions after an adjustment, by the board of railroad commissioners, of all the claims paid or presented within six months after the completion of the work.

*Matter of Melenbacker v. Vil. of Salamanca*, 116 App. Div. 691, affirmed.

(Argued April 2, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 7, 1907, which affirmed an order of Special Term denying the application of the petitioner for the appointment of commissioners to appraise the damages alleged to have been sustained by him by reason of a change of grade in the street in front of his premises and dismissing the proceeding.

The facts, so far as material, are stated in the opinion.

*Henry P. Nevins* for appellant. The petition alleges all jurisdictional facts, and there being no controverted questions of fact, an order appointing commissioners should have been granted. (*Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Matter of Stack v. Port Chester*, 50 Hun, 385; *Matter of Greer*, 39 App. Div. 222; *Matter of McCall v. Saratoga*, 26 N. Y. S. R. 699; *Matter of Forge v. Vil. of Salamanca*, 176 N. Y. 324.) Section 65 of the Railroad Law does not contemplate the service of notice therein provided by the abutting property owner who asserts that he has been damaged. (*Matter of Torge v. Vil. of Salamanca*, 176 N. Y. 324.)

*Thomas L. Newton* for Village of Salamanca, respondent. In order for the petitioner to recover damages for the change of grade in question he must show that the right was given by some express statute. (*Smith v. B. & A. R. R. Co.*, 181 N. Y. 132; *Conklin v. N. Y., O. & W. Ry. Co.*, 102 N. Y. 107.) The petitioner has not shown facts sufficient to give the court jurisdiction to appoint commissioners to assess any

damages to his property by reason of the change of grade in question. (*Comesky v. Vil. of Suffern*, 179 N. Y. 393; *Matter of Village of Waverly*, 35 App. Div. 41; *Smith v. B. & A. R. R. Co.*, 181 N. Y. 132; *Matter of Torge v. Vil. of Salamanca*, 176 N. Y. 324; *Vil. of Bolivar v. P., S. & N. R. R. Co.*, 88 App. Div. 387.) Section 65 of the Railroad Law, as amended by chapter 517, Laws of 1900, taking effect April 19, 1900, applies to this proceeding and invades no constitutional right of the petitioner. (*People v. N. Y. C. & H. R. R. R. Co.*, 158 N. Y. 410; *Matter of Ludlow Street*, 172 N. Y. 542; *Lazarus v. M. E. R. R. Co.*, 145 N. Y. 581; *Sauer v. City of New York*, 180 N. Y. 27; *Brewster v. Rogers Co.*, 169 N. Y. 73; *W. R. Co. v. Defiance* 167 U. S. 88.)

*F. A. Robbins* for Erie Railroad Company, respondent. The remedy of the petitioner is wholly statutory, and he has no right at common law to recover damages on account of the change of the grade in question. (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Smith v. B. & A. R. R. Co.*, 181 N. Y. 132; *Gozler v. City of Georgetown*, 19 U. S. 593; *W. Ry. Co. v. Defiance*, 167 U. S. 88; *Conklin v. N. Y., O. & W. R. Co.*, 102 N. Y. 107.) The petitioner cannot maintain this proceeding for the reason that he did not comply with the provisions of section 65 of the Railroad Law by filing a notice of his claim with the state board of railroad commissioners within six months after the change of grade was completed. (L. 1900, ch. 517, § 65; *Smith v. B. & A. R. R. Co.*, 181 N. Y. 132.) Section 65, as amended by chapter 517 of the Laws of 1900, taking effect April 19, 1900, applies to this proceeding. (*People v. N. Y. C. & H. R. R. R. Co.*, 158 N. Y. 410; *Matter of Ludlow Street*, 172 N. Y. 542; *Lazarus v. M. E. R. R. Co.*, 145 N. Y. 581.)

*CHASE, J.* Prior to 1900 the tracks of the Erie Railroad Company crossed Main street, in the village of Salamanca, at grade. In that year the president and trustees of said village

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made application, by petition in writing, to the board of railroad commissioners of the state of New York, pursuant to the provisions of section 62 of the Railroad Law (Laws of 1890, chapter 565, with subsequent amendments), to have the crossing changed from grade, so that the street would be carried under said railroad tracks.

On April 11th, 1901, the board of railroad commissioners ordered that the crossing be changed from grade, and that the street be carried underneath said railroad tracks substantially as shown by a plan on file in its office. The plans of the board of railroad commissioners were approved by the village, and said village also authorized and approved a resultant change of grade of said street.

The change in the grade of said street was made by the railroad company in accordance with said plan under an agreement with contractors made with the approval and consent of said board of railroad commissioners and said village. The work was fully completed prior to the 6th day of November, 1902, and on that day, and within sixty days after said work was completed, the petitioner filed with the clerk of said village a verified claim for his alleged damages arising from said change of grade. The petitioner is the owner of certain real property on the east side of said Main street. Only the westerly half of said street was lowered. That part of the street between the petitioner's property and the center of said street was not changed. No notice or claim for damages to the petitioner's property on account of the change of said crossing and by reason of the change of grade in said street as alleged in the petition was ever filed with the board of railroad commissioners by the petitioner or other person of corporation.

Nearly four years after said work was completed, the petitioner commenced this proceeding for the appointment of commissioners to determine the amount of compensation to which he is entitled by reason of such change of grade. There is no dispute in regard to the facts.

It is settled law in this state that the owner of property

abutting on a highway which is graded or changed by the public authorities has no right of action against the town or municipality unless such right is given by some express statute. At common law there is no such liability. (*Smith v. Boston & Albany R. R. Co.*, 181 N. Y. 132; *Matter of Torge v. Village of Salamanca*, 176 N. Y. 324.)

By chapter 113 of the Laws of 1883 provision was made for determining the amount of damages sustained by the owner of real property in any incorporated village by the change of the grade of a street therein, and it also provided that the damages so ascertained and determined shall be a charge upon the village, town or other municipality chargeable with the maintenance of the street so altered or changed.

This statute was amended in 1884 (Chap. 281) and in 1894 (Chap. 172) and as so amended reads in part as follows : "Section 1. Whenever the grade of any street, highway or bridge in any incorporated village in this state shall be changed or altered so as to interfere in any manner with any building or buildings situate thereon, or adjacent thereto, or the use thereof, or shall injure or damage the real property adjoining such highway so changed or altered, the owner or owners of such building or real estate may apply to the Supreme Court in the judicial district in which such property is situated for the appointment of three commissioners to ascertain and determine the amount of damage sustained thereby ; due notice of such application shall be given to the person or persons having competent authority to make such change or alteration." (L. 1883, ch. 113.)

"Section 3. All damages ascertained and determined under the provisions of this act, together with the costs of such proceedings, shall be a charge, when allowable, upon the village, town or other municipality chargeable with the maintenance of the street, highway or bridge so altered or changed ; \* \* \*." (L. 1894, ch. 172.)

By the Village Law (Laws of 1897, chapter 414, section 342, sub. 4) "chapter 113 of the Laws of 1883, and the acts amendatory thereof, so far as they relate to the change of grade of

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streets or bridges by village authorities" was repealed, but said act, as amended, is still extant to authorize a proceeding as provided by said act and its amendments except as to the change of grade of streets or bridges by village authorities. (*Matter of Torge v. Village of Salamanca, supra.*) Section 159 of said Village Law is not applicable to this case. (*Matter of Torge v. Village of Salamanca, supra.*)

Sections 60 to 69, inclusive, of said Railroad Law (L. 1890, ch. 565), provide a complete system for establishing, altering and changing the crossing of streets and highways by steam surface railroads.

Section 62 of said act provides, among other things, that the trustees of any village within which a street is crossed by a steam surface railroad at grade may bring their petition in writing to the board of railroad commissioners to change such crossing from grade and praying that the same may be ordered.

The railroad commissioners, upon notice, as in the section provided, to the petitioner, the railroad company, the municipality in which such crossing is situated, and the owners of the lands adjoining such crossing and adjoining that part of the highway to be changed in grade or location, are required to appoint a time and place for hearing the petition and to determine what alterations or changes, if any, shall be made. Provision is made for an appeal from the determination of said commissioners to the Appellate Division of the Supreme Court and to this court. Section 63 of said act provides :

"The municipal corporation in which the highway crossing is located, may, with the approval of the railroad company, acquire by purchase any lands, rights or easements necessary or required for the purpose of carrying out the provisions of section sixty, sixty-one and sixty-two of this act, but if unable to do so, shall acquire such lands, rights or easements by condemnation either under the condemnation law, or under the provisions of the charter of such municipal corporation. The railroad company shall have notice of any such proceedings and the right to be heard therein."

Section 65 of said act provides that "Whenever a change is made as to an existing crossing in accordance with the provisions of section sixty-two of this act, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation, and twenty-five percentum by the state."

It is further provided by said section that "In carrying out the provisions of sections \* \* \* sixty-two of this act the work shall be done by the railroad corporation or corporations affected thereby, subject to the supervision of and approval of the board of railroad commissioners, \* \* \* and the expense of construction shall be paid primarily by the railroad company, and the expense of acquiring additional lands, rights or easements, shall be paid primarily by the municipal corporation wherein such highway crossings are located."

It is further provided by said section that "Upon the completion of the work and its approval by the board of railroad commissioners an accounting shall be had between the railroad corporation and the municipal corporation, of the amounts expended by each with interest, and if it shall appear that the railroad corporation or the municipal corporation have expended more than their proportion of the expense of the crossing as herein provided, a settlement shall be forthwith made in accordance with the provisions of this section. All items of expenditure shall be verified under oath. \* \* \*"

Provision is made for the appointment of a referee to take testimony as to the amount expended in case of a dispute relating thereto.

It is also therein provided: "No claim for damages to property on account of the change or abolishment of any crossing under the provisions of this act shall be allowed unless notice of such claim is filed with the board of railroad commissioners within six months after completion of the work necessary for such change or abolishment." (L. 1900, ch. 517.)

The change in the grade of said street was made necessary by the abolishment of the railroad grade crossing and the

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authority for making the change of grade as stated is wholly found in the special statutory provisions quoted. Ample provision is made in said statutes for the protection of the property rights of abutting landowners. If the lands, rights or easements necessary or required for the purpose of carrying out the provisions of the act are not acquired by the municipality by purchase or by condemnation under the Condemnation Law or the provisions of the charter of the municipal corporation, the claim for damages must be filed with the board of railroad commissioners within six months after the completion of the work. The necessity for a statute limiting the time within which a claim can be made for such damages arises from the fact that after the completion of the work an accounting is had between the municipality and the railroad company, to be approved by the board of railroad commissioners, and a settlement is then had between said municipality and the railroad corporation and the state, based upon said accounting. Without some special statutory provision limiting the time within which a claim for damages can be asserted, the accounting and settlement might be had without knowledge of alleged claims.

As the claim for damages arising by a change of grade of a street or highway is given by statute where it did not exist at common law the statutory remedy is exclusive, and must be followed by those seeking relief. (*Smith v. Boston & Albany R. R. Co., supra.*)

The authority granted by the act of 1883 to maintain a proceeding in the name of an owner for the purpose of determining the damages arising from a change of grade must be read in connection with the sections of the Railroad Law by which the change of grade of the street in front of the petitioner's property was expressly authorized. There is no difficulty, as said in the *Torge* case, in the harmonious and concurrent working of both statutes.

In the *Torge* case notice was filed with the board of railroad commissioners as provided by section 65 of the Railroad Act. In this case no such notice has ever been filed. The failure

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of the petitioner to file a notice as provided in said section prevents him from maintaining this proceeding.

The order appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ., concur.

Order affirmed.

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RICHARD S. WANSER, Respondent, *v.* JOHN DE NYSE et al., Defendants.

FRANKLIN S. HOLMES, Appellant.

1. REAL PROPERTY—JUDICIAL SALE THEREOF—UNLESS TITLE IS MARKETABLE BIDDER IS NOT REQUIRED TO COMPLETE PURCHASE. A person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid.

2. WHEN MOTION TO COMPEL BIDDER TO COMPLETE PURCHASE MAY BE MADE—CLAIM OF DEFECTIVE TITLE—AFFIDAVITS. The fact that a person bids upon property at a judicial sale and signs the terms of sale by which he agrees to complete his purchase at a specified time is sufficient on which to move for an order compelling the purchaser to perform his agreement. If answering affidavits are read alleging, and claiming to show, that the title is defective the Special Term may allow the production of such further affidavits, by either party, relating to the title as may be necessary or desirable to bring to the attention of the court the true facts in regard thereto.

3. WHEN ORDER DIRECTING BIDDER TO COMPLETE PURCHASE MAY BE REVERSED AND REFERENCE TO TAKE PROOF ORDERED. Where the affidavits, constituting the record upon which an order was granted requiring a bidder at a judicial sale to complete his purchase, are very general and in part upon information and belief, so that, after a full consideration of all the facts alleged, an ordinarily prudent person would be justified in hesitating about accepting title to the property or loaning money thereon, the order should be reversed and the case remitted to the Special Term to take further proofs and for a rehearing thereon.

*Wanser v. De Nyse*, 116 App. Div. 796, reversed.

(Argued April 2, 1907; decided April 30, 1907.)

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N. Y. Rep.]Points of counsel.

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APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 11, 1907, which affirmed an order of Special Term directing the appellant herein to complete his purchase of real property sold at a partition sale.

The facts, so far as material, are stated in the opinion.

*A. P. Bachman* and *John Oscar Ball* for appellant. The Special Term is limited to the scope of the moving papers and in allowing the moving party to submit supplemental affidavits without notice to the adversary or leave, the court committed reversible error. (*Calder v. Bull* 3 Dall. 386; 3 Story on Const. 264, 661; *People v. Toynbee*, 13 N. Y. 378; *Rice v. Ehle*, 55 N. Y. 524; *Badger v. Gilroy*, 47 N. Y. Supp. 669; *Deutermann v. Pollock*, 36 App. Div. 522; *Ferguson v. Commonwealth Rubber Co.*, 38 N. Y. Supp. 375; *Rubino v. Mariano*, 65 App. Div. 314; 73 N. Y. Supp. 7; *Newbury v. Newbury*, 6 How. Pr. 183; *Morley v. Green*, 11 Paige, 240; *Van Benthuysen v. Stevens*, 14 How. Pr. 70.) The title is not marketable and the papers sufficiently raise the issue. (*T. G. & T. Co. v. Fallon*, 101 App. Div. 188; *Greenblatt v. Hermann*, 144 N. Y. 13; *Fleming v. Burnham*, 100 N. Y. 10; *Vought v. Williams*, 120 N. Y. 253; *Blanck v. Sadlier*, 153 N. Y. 556; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Moore v. Williams*, 115 N. Y. 586; *Scripture v. Morris*, 159 N. Y. 534; 38 App. Div. 377; *Brokaw v. Duffy*, 165 N. Y. 391.)

*Washington Sackmann* and *Edmund C. Viemeister* for respondent. The purchaser fails to base his refusal to complete his purchase on any error on the record of the title or outside thereof. He presents no fact constituting a real question. There must be a real question and a real doubt. (*Greenblatt v. Hermann*, 144 N. Y. 13; *Fleming v. Burnham*, 100 N. Y. 10; *Cambrelling v. Purton*, 125 N. Y. 610; *Hagan v. Drucker*, 90 App. Div. 28; *Todd v. U. D. S. Inst.*, 128 N. Y. 636.) A suspicion or conjecture without any facts to support it, does not raise a reasonable doubt as to the validity

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of a title good upon the record. (*E. R. Corp. v. Sayre*, 107 App. Div. 415; *T. G. & T. Co. v. Fallon*, 101 App. Div. 188.) The purchaser has been relieved from his purchase by the court only in such cases where positive questions of fact have been presented by him as an excuse. (*Moore v. Williams*, 115 N. Y. 586; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Vought v. Williams*, 120 N. Y. 253; *Scripture v. Morris*, 38 App. Div. 377.)

CHASE, J. In this state a person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable, such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid. (*New York Security and Trust Company v. Schoenberg*, 87 App. Div. 262; affd., 177 N. Y. 556; *Mott v. Mott*, 68 N. Y. 246; *Crouter v. Crouter*, 133 N. Y. 55; *Cambrelleng v. Purton*, 125 N. Y. 610; *Jordan v. Poillon*, 77 N. Y. 518; *Miller v. Wright*, 109 N. Y. 194; *Matter of Fales*, 33 App. Div. 611; affd., 157 N. Y. 795.)

The decision on such a motion should be based upon equitable principles. It does not even as between the parties amount to a determination that the title to the property is perfect or imperfect. The purchaser being entitled to a marketable title should not be compelled to take a title that will not be accepted by an ordinarily prudent man when the property is again offered for sale or as security for a loan.

This court has frequently stated the rights of vendors and vendees in cases involving a marketable title to real property. In *Fleming v. Burnham* (100 N. Y. 1, 10) the court say: "A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact or a doubtful question of law, in the absence of the party in whom the outstanding

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right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged."

In *Heller v. Cohen* (154 N. Y. 299, 306) the court in stating the rules applicable to an action for specific performance say: "To entitle a vendor to specific performance he must be able to tender a marketable title. A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title that will enable him to hold his land free from probable claim by another and one that, if he wishes to sell, would be reasonably free from any doubt which would interfere with its market value. If it may be fairly questioned, specific performance will be refused. (*Vought v. Williams*, 120 N. Y. 253, 257; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Fleming v. Burnham*, 100 N. Y. 1.)

"So, where there is a defect in the record title which can be supplied only by resort to parol evidence and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract. (*Irving v. Campbell*, 121 N. Y. 353; *Holly v. Hirsch*, 135 N. Y. 590, 598.)"

The motion in this case is based wholly upon an affidavit of a clerk in the office of the plaintiff's attorney, consisting of a few sentences alleging that the action is brought for partition, and that the premises described in the notice of sale were offered for sale by a referee pursuant to an interlocutory judgment in the action; that the appellant on this appeal became the purchaser for \$10,100 and paid to the referee 10%

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of the amount of his bid and agreed to pay the remainder thereof on a day specified and that he has failed to make the payment as so agreed. The affidavit further states that the purchaser declined to complete his purchase for the reason "that his counsel is unable to ascertain certain facts relating to the heirs, and their identity, of a former owner of said premises who died seized thereof intestate."

The appellant appeared upon the motion and read two affidavits made by his attorney, in one of which he alleges that the referee is unable to give a marketable title to the property and in the other of which he alleges that "Said property appears to have been a part of a plot of farm land acquired in 1827 by one Francis Oliver, a colored man; that deponent has been and still is unable to find any proof of the death of said Oliver or of proceedings in the Surrogate's Court of Kings County relative to the estate of said Oliver; that in 1865 and 1866 there were filed in the office of the Register of Kings County quit-claim and bargain-and-sale deeds from some thirty-nine parties, conveying or professing to convey the said property to one Abraham Wanser; that there is nothing in the records or outside, as far as deponent and the Title Company employed to search the title are concerned, to show that the grantors of said deeds were all the heirs of Francis Oliver, or that there were any steps taken to put a record of such heirs on the public files so that the purchaser Franklin S. Holmes is now confronted with a title which is clouded by an uncertainty, and which he might be obliged to protect as against unknown heirs entitled to share in the estate of Francis Oliver."

In support of the title the plaintiff then produced an affidavit of a person in which he says, that a number of the heirs of Francis Oliver, deceased, in 1865 spoke to him about purchasing the property and that he agreed with one of such persons that he would pay \$700 therefor, and that he then gave the money to a justice of the Supreme Court, and requested him to supervise the transfer of the property and secure for him a good title thereto, and that he was subse-

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quently told by him that all of the heirs at law of said Francis Oliver, deceased, had signed deeds of said property, and that the same had been recorded. That he thereupon took possession of the property and about 1893 conveyed it to his wife, the mother of the parties to this action, who is now deceased, and that at no time since the conveyances to him has the title to said property been questioned, or the possession of himself and wife and her heirs been disputed or called in question. He also produced an affidavit made by a son of said justice, who alleges that he had charge of procuring said deeds and that he verily believes that the grantors named in the several conveyances of record comprise all the heirs at law of said Francis Oliver deceased.

The record to sustain the order requiring the appellant to complete his purchase consists of said four short affidavits. The statements in the affidavits are very general, and in part on information and belief. None of the papers in the action are before the court, and the property is not even described in the record before us, except by a general statement that it is situated in the town of Flatlands, Kings county, within the borough of Brooklyn, city of New York.

The fact that a person bids upon property at a judicial sale and signs the terms of sale by which he agrees to complete his purchase at a specified time, is doubtless sufficient on which to move for an order compelling the purchaser to perform his agreement. If answering affidavits are read alleging and claiming to show that the title is defective, the Special Term may allow the production of such further affidavits relating to the title as may be necessary or desirable to bring to the attention of the court the true facts in regard thereto. The rights of the parties can always be fully protected by the court in directing when and upon what conditions further affidavits are to be read.

We do not find that the court erred in allowing further affidavits to be read on behalf of the plaintiff, or that the appellant made known to the court that he desired to produce further affidavits on his part, or that he asked that a referee

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be appointed to take evidence in regard to said title. The appellant erroneously assumes that it was the duty of the court on its own motion to order a reference, and that testimony taken before a referee would be perpetuated for use against persons other than parties to the action. In the affidavits it is practically conceded that Francis Oliver was the owner in fee of the lands in question in 1827, and although it is generally asserted that Francis Oliver died prior to the giving of the deeds in 1865 and 1866, it does not appear when or where he died, or whether he left descendants. Each of the affiants in the replying affidavits is an old man, and each shows that he has lived in the vicinity of the premises in question for many years, one since 1844 and the other all his life, and that he was acquainted with the Oliver family, but for some reason that is not disclosed not a word is said in regard to the death of said Oliver, or as to his heirs at law, except in general terms, as hereinbefore stated. No record can be found by the appellant of the death of Francis Oliver, or in any way relating thereto, and the deeds given in 1865 and 1866 do not contain recitals showing the history of the Oliver family or of the relationship of the grantors therein to said Francis Oliver or the property. It is not necessary to discuss the question as to the burden of proof as between the appellant and respondent on the motion, not only for the reason that the affidavits were considered at the Special Term without reference to the burden of proof, but as the affidavits of both parties assume that Francis Oliver was the owner of the fee of the property in 1827 the subsequent record title is not sufficient apart from extrinsic evidence to make the title free from reasonable doubt unless the possession under said deeds is sufficient to sustain the respondent's claim.

Where the facts are sufficiently clear, adverse possession may alone be sufficient to make a title which a purchaser at a judicial sale should be compelled to accept. (*Shriver v. Shriver*, 86 N. Y. 575; *Simis v. McElroy*, 12 App. Div. 434; *affd.*, 160 N. Y. 156; *Freedman v. Oppenheim*, 187 N. Y. 101; *Messinger v. Foster*, 115 App. Div. 689.)

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The only affidavit relating to adverse possession is general in its terms. The character of the property is not disclosed except that it appears that it has been cultivated. The extent of the cultivation does not appear, and it is not shown whether the lands have been inclosed or marked by visible boundaries. The proof of adverse possession is not shown with that clearness required to make a marketable title based wholly thereon.

It may be that extrinsic evidence can be obtained to show that the deeds of record make a complete and perfect title to the property and that the possession of the parties to the action and their predecessors in title has been sufficient apart from the record title, or in connection therewith, to sustain an order compelling the purchaser to complete his purchase.

The record, however, is very unsatisfactory, and after a full consideration of all that it contains an ordinarily prudent person would be justified in hesitating about accepting title to the property or loaning money thereon. The order should be reversed, with costs to appellant in this court, and the case remitted to the Special Term to take further proofs and for a rehearing thereon.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ., concur.

Ordered accordingly.

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THE PEOPLE'S TRUST COMPANY, as Substituted Trustee under the Will of JOHN FLYNN, Deceased, Respondent, *v.* MARY C. FLYNN et al., Appellants, and ANNIE D. FLYNN, Individually and as Administratrix of the Estate of JOHN FLYNN, Deceased, et al., Respondents.

1. TESTAMENTARY TRUST — WHEN GIFT OF RESIDUARY ESTATE IN TRUST TO PAY ANNUITY TO WIDOW FOR LIFE AND BALANCE OF INCOME TO CHILDREN DURING LIVES OF TWO DAUGHTERS OF TESTATOR NOT AN UNLAWFUL SUSPENSION OF POWER OF ALIENATION. The will of a testator gave his entire estate, real and personal, remaining after the payment of his debts and some general bequests, to his executors in trust, to

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pay to his wife, from the income thereof, a certain annuity during her life in lieu of dower, and after the payment of "the above annuity or dower interest" to divide the net residue of the income into five equal parts and pay one share thereof to each of his two daughters and three sons, or their issue, until the death of the two daughters; if any of such five children should die before the testator, without issue, the net residuary income to be divided among those surviving or represented by issue; upon the death of the two daughters, the residuary estate was given to the issue of his two daughters, naming each, and to his three sons, naming each, "or to the issue of either of said sons, if they shall have previously died leaving issue." Held, that the trust is measured by the lives of the two daughters, and terminates upon the death of the survivor of them; when the survivor dies the *corpus* of the trust will vest in the residuary legatees, subject to the payment of the annuity to testator's widow, so that if the value of her annuity be computed and paid the lien thereof can be discharged and the residuary estate divided among the legatees entitled thereto at that time.

**2. FAILURE TO PROVIDE FOR DISPOSITION OF INCOME AND CORPUS OF TRUST IN EVENT OF DEATH OF CHILD WITHOUT ISSUE BEFORE TERMINATION OF TRUST—SHARE OF SUCH DECEASED CHILD MUST BE DISTRIBUTED UNDER STATUTE OF DESCENTS AND DISTRIBUTION.** No provision having been made for the disposition of either the income or *corpus* of the trust in the event of the death of one, or more, of testator's children, without issue, during the existence of the trust, since the gift was to take effect *in futuro*, when the last of the two daughters died, not *in presenti*, as of the date of the will, and one of testator's sons having died since the death of testator, without issue, during the pendency of the trust, testator died intestate, both as to the income and *corpus* of that part of the trust to which said son, or his issue, would have been entitled; and, therefore, a grandchild, son of a deceased daughter of testator, who was excluded from any participation in the division of the residuary estate, as made by the will, is not excluded from participating in the division of the share of such deceased son, under the Statute of Descents and Distribution.

*People's Trust Co. v. Flynn*, 113 App. Div. 683, reversed.

(Argued April 8, 1907; decided April 30, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 25, 1906, which affirmed a judgment of Special Term construing the will of John Flynn, deceased.

On the 18th of October, 1897, John Flynn, a resident of the city of Brooklyn, died at the age of seventy, leaving a last will and quite a large estate. His widow, five children

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and one grandchild, the son of a daughter who died before the execution of the will, survived him as his only heirs at law and next of kin. Two daughters and one son were the children of his first wife, while two sons were the children of his second wife. The youngest son, James, died on the 26th of January, 1904, at the age of eleven, leaving his mother, four brothers and sisters and a nephew of a deceased sister as his only heirs at law and next of kin. John Flynn by the residuary clause of his will created a trust and this action was brought by the substituted trustee for the construction of that clause. The plaintiff asked specifically for instructions as to its rights and duties "as to a distribution of the rents and income of the share of the said James Flynn, deceased, during the continuation of the trust and as to how it shall distribute or transfer the share of said James Flynn, deceased, under his father's will when the trust shall cease." It also asked generally that the residuary clause "be judicially construed and that it be determined whether or not such residuary clause is valid." Various parties defendant answered and united in the prayer of the complaint for the construction of the residuary clause, and one of them asked that it be declared void because the trust was limited "on three lives in being at the death of the testator, contrary to the statute in such case made and provided."

Upon the first trial of the case the only question which appears to have been litigated related to the share of the son who died intestate after his father, and it was decided that the testator died "intestate as to such share and its income." (44 Misc. Rep. 6.) An appeal was taken from the judgment of the Special Term to the Appellate Division, which, without considering the question passed upon below, decided, but not until after a reargument, that the trust was void because measured by three lives in violation of the statute. As it appeared that there were infants interested in the remainders affected who were not before the court a new trial was granted so that they could be brought in. (106 App. Div. 78.) Upon the second trial judgment was rendered in accordance with

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the views previously expressed by the Appellate Division and it was affirmed on appeal. (113 App. Div. 683.) From the judgment of affirmance this appeal is taken.

*S. P. Cahill* and *John Delahunty* for appellants. There is no suspension of the power of alienation here as the trust must terminate on the death of the testator's two daughters. (*Buchanan v. Little*, 135 N. Y. 147; *Herzog v. T. G. & T. Co.*, 177 N. Y. 93.) The testator did not intend that the remainder should vest. (*Stinson v. Vroman*, 99 N. Y. 74; *Bogart v. Jones*, 2 How. Pr. 491; *Matter of Westcott*, 16 N. Y. S. R. 286; *Freeman v. Coit*, 96 N. Y. 63; *Phillip v. Davies*, 92 N. Y. 199.)

*T. Ellett Hodgskin* for plaintiff, respondent. There is no suspension of the power of alienation beyond the lives of the testator's two daughters, Mary and Regina, contained in the trust provision of the will. (*Buchanan v. Little*, 154 N. Y. 147; *Dunham v. Deraismes*, 165 N. Y. 69.)

*Robert P. Orr* for John Flynn, Jr., respondent. There is no violation of the statute against perpetuities. (*Buchanan v. Little*, 154 N. Y. 147.) In the event of the death of any of the sons, intestate and without issue, after the death of testator and during the continuance of the intermediate estate, his share became a part of his estate subject to be disposed of as the law provided. (*Bowditch v. Ayrault*, 138 N. Y. 222.)

*Forbes J. Hennessy* for William J. Flynn, Jr., et al., respondents. There is no illegal suspension of the power of alienation. (*Buchanan v. Little*, 154 N. Y. 447.) There being a valid suspension of the power of alienation and no direction for the accumulation of the rents and profits they belong to the persons presumptively entitled to the next eventual estate. (*Kilpatrick v. Johnson*, 15 N. Y. 326; *Gould v. Rutherford*, 29 Hun, 280.)

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*David McClure* for Charles Egan, respondent. The will creates a trust for the benefit of the wife. (L. 1896, ch. 547, § 76.) The will creates a valid trust of the "net residue" of the income. (*Bailey v. Bailey*, 97 N. Y. 460.) The will provides for an illegal suspension of the power of alienation. (*Cochran v. Schell*, 140 N. Y. 516; *Greenwood v. Holbrook*, 111 N. Y. 465; *Bailey v. Bailey*, 97 N. Y. 460; *Corse v. Chapman*, 153 N. Y. 466.)

*M. F. McGoldrick* for Annie D. Flynn, respondent. There is an illegal suspension of the power of alienation in the attempted disposition of the estate in the residuary clause of the will. (*Herzog v. T. G. & T. Co.*, 177 N. Y. 86; *Hooker v. Hooker*, 166 N. Y. 156; *P. Trust Co. v. Flynn*, 106 App. Div. 78; L. 1906, ch. 547, § 32; L. 1897, ch. 417, § 2.)

VANN, J. The testator made his will on the 18th of February, 1897, eight months before he died. After providing for the payment of his debts and funeral expenses he made some general bequests, and among them was "the sum of one hundred dollars per annum" to his sister, Ann Flynn, "to be paid to her by my executors hereinafter named for and during the term of her natural life." The residuary clause is as follows: "I hereby give, devise and bequeath all the rest, residue and remainder of my estate, real and personal of which I may die seized, entitled to, or possessed of, unto my said executors hereinafter named as trustees, to them, and their successors, to have and to hold the same for the following uses, intents and purposes, viz. :

"To enter into and take possession of same, to keep the real estate in repair; to pay all insurance, taxes, assessments and water rates which may accrue against said property and also other necessary expenses; to collect and receive all the rents, issues, profits and income therefrom, and out of the net annual income of my said residuary estate pay over to my wife Annie the sum of one thousand eight hundred dollars (\$1,800) per annum, payable half yearly for and during the term of her

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natural life, which payment shall be in lieu of all dower right or interest which she might or may have in my estate; and also after the payment of the above annuity or dower interest to my wife, to divide the net residue of the income derived under said trust into five equal parts and pay over one share thereof to each of my five children, namely, Mary C., Regina, William J., John, Jr., and James, or the issue of each child or any of them who shall die leaving issue, until the death of my two daughters, Mary and Regina. If, however, any of said five children shall have predeceased me, without issue surviving them, then said net residuary income shall be equally subdivided among those living or represented. Upon the death of my two daughters Mary and Regina, I give, devise and bequeath the entire estate of which I may die seized, entitled to or possessed of to the issue of said Mary, the said Regina, William J. Flynn, John Flynn, Jr., and James Flynn, or to the issue of either of said sons, if they shall have previously died leaving issue, such issue taking the share which would have belonged to its parent in equal shares; hereby excluding my grandchild Charles Eagan, or his issue, from any participation in the division of my residuary estate."

The widow refused to accept the provisions of the will in lieu of dower, and her dower was duly admeasured by a final judgment rendered in an action brought by her in the Supreme Court for that purpose.

It is insisted on the one hand and the courts below so decided, the Appellate Division unanimously and the Special Term under the constraint of the Appellate Division, that the provision for the wife is part of the trust; that the provision for the children until the death of the two daughters is also part of the trust; that the testator did not intend that the title of the trustees should be divested until the death of the wife and the two daughters and, hence, as the duration of the trust was measured by the three lives, namely, those of the widow and the two daughters, it was void. On the other hand, it is insisted that the testator intended to give his wife

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an annuity chargeable upon the residuary estate and that the case is governed by our recent decision in *Buchanan v. Little* (6 App. Div. 527; 154 N. Y. 147).

The case cited impresses us as strikingly similar in its facts to the one in hand. As the will involved in that case is set forth more fully in the Appellate Division reports than in our own, we quote therefrom the residuary clause as follows:

“*Second.* I give, devise and bequeath all the remainder of my estate, both real and personal, to my executors hereinafter named, and the survivor of them, in trust, however, for the uses and purposes hereinafter set forth, to take the possession, care and management thereof, to let or lease the real estate and safely invest the personal estate, to collect the rents and income and to pay taxes, assessments, insurance, cost of repairs and other proper charges thereon, and pay over the net income of my said estate, as follows:

“1st. I direct my said executors to pay my beloved wife, Jane Cooper, the sum of five hundred dollars per year, each and every year during her natural life, to be paid half-yearly or quarterly, if practicable, which said sum is hereby given in lieu of dower.

“2d. I direct my said executors to pay to my sister, Rebecca Cooper, the yearly sum of four hundred dollars, each and every year during her natural life, payable quarterly.

“3d. I direct my said executors to pay all the remainder of the income of my estate, after paying the above-mentioned legacies to my wife and sister as follows: One-half of the remainder of the income of my said estate to my daughter, Sarah Jane Little (formerly Cooper), for and during her natural life, and the other half of the remainder of my said income to my daughter, Mary E. Cooper, for and during her natural life, said income to be paid half-yearly or quarterly, if practicable.

“4th. Should either of my said daughters die without lawful issue, during the life of the other, I give the share of the deceased sister in my estate to the survivor.

“5th. Should either die during the life of the other, leaving

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lawful issue, I direct the share of such deceased sister to be paid to her children, share and share alike.

"6th. At the death of my two daughters, Sarah Jane Little and Mary E. Cooper, I give, devise and bequeath all my property, both real and personal, to their children, one-half to the children of each daughter, share and share alike, *per stirpes* and not *per capita*. Should either of my said daughters die without leaving lawful issue, then I give all my estate to the children of the other, share and share alike. Should both of my said daughters die without leaving lawful issue, my estate shall then go to my heirs at law."

When this will came before us for construction all the judges united in holding that "there was created a valid trust dependent, as to its duration, upon the lives of the two daughters; that the annuities to the wife and sister were a charge upon the residuary estate, whether held in trust or freed therefrom by the falling in of the selected lives; and that, at the termination of the trust, the present value of the annuities should be ascertained and the amount paid over to the annuitants and the remainder of the estate distributed to the remaindermen, discharged of any lien."

Analogy is seldom so exact as that which exists between these two wills and we are unable to distinguish the case before us from the case cited. The facts are almost identical and the same principle must govern both. The testator in each measured the trust by the lives of his two daughters. As long as either of them lived the trust continued, and it died with the last survivor. In each case the executors were ordered to pay out of the net income a certain sum annually to the widow "during her natural life" in lieu of dower. In the *Cooper* will that sum was held to be an annuity, although the testator did not so name it, while, in the will before us, he spoke of it as the "annuity or dower interest" of his wife. Although in the earlier case there were words of direct gift to the widow in addition to the direction to pay, still there was but a naked direction to pay to the "sister, Rebecca Cooper, the yearly sum of \$400 each and every year

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during her natural life," and thus the parallel between the facts of the two cases continues. The provision for the widow bears the same relation to the trust in the one case as in the other, but in neither was it intended to affect the duration thereof. It was made a charge upon the residuary estate, but this did not prolong the period of the trust, and when the trust ended the charge continued if the widow still survived. The trust was measured by the lives of the daughters and the *corpus* vested, subject to the charge when those lives fell in, while, if the widow was still living, the value of her annuity when computed and paid would discharge the lien. The estate could thus be divided as soon as the daughters died and the command of the statute in all things observed. The gift to the wife was not, as is frequently the case, a paramount object, for the property was mostly real estate, and the will gave her less than the law. Her election to take dower, however, does not affect the question presented, which is governed by what might have happened, not by what has happened. We regard further discussion of the subject as unnecessary, for the principle of *stare decisis*, as well as the rule requiring a construction which will preserve a will rather than destroy it, when possible, compel us to hold the trust to be valid and binding in every respect.

This conclusion makes it necessary to decide the question which this action was brought to settle, and which was the only question considered upon the first trial, namely: As the son James died after the testator, what is to become of his share of both income and *corpus*? Provision is made by the will for the children who survive the testator and for the issue of such as do not survive him, but no disposition is made of either income or corpus as to a child dying without issue during the existence of the trust. Thus there was a failure to provide for the contingency which happened through the death of the youngest child without issue. Neither the aged testator nor the person whom he employed to draw his will apparently thought of that possibility. There is no express gift of the share which James would have taken |

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had he lived, and nothing from which a gift can fairly be implied. The *corpus* vested in the trustees until, or, to use the language of the testator, "upon the death" of his two daughters, when he devised and bequeathed "the entire estate" in remainder. The gift was to take effect *in futuro*, not *in presenti*. He did not give as of the date of the will, but as of the date when the last of the selected lives fell in. The only gift of the remainder is "upon the death" of Mary and Regina, while the gift of the income is through the direction for the annual payment thereof. After the death of James the income could no longer be paid to him, and there was no direction to pay it to any one else, under the circumstances then existing. The testator did not intend that the residuary estate should vest in any of his heirs upon his death, subject to the execution of the trust, but only upon the death of his daughters after the trust had been executed. Until that time arrived he gave nothing except through the direction to the trustees to pay over the net annual income. When that time arrived he gave the remainder to the issue of his two daughters, naming each, and to his three sons, naming each, "or to the issue of either of said sons, if they shall have previously died leaving issue." From the age of his children as compared with his own, and from the fact that the gift in remainder was not to take effect until both his daughters died, he evidently meant by the word "previously" a death during the continuance of the trust and not during his own life. Until the trust ended he did not intend that his residuary estate should vest so that it could be sold and squandered. (*Lewisohn v. Henry*, 179 N. Y. 352.)

We think, as was held by the Special Term upon the first trial (44 Misc. Rep. 6), that the testator died intestate, both as to the income and *corpus*, with reference to any child dying intestate and without issue during the period of the trust. Therefore, the grandchild, Charles Eagan, although excluded from any participation in the division of the residuary estate as made by the will, is not excluded from participating in the

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division of such part as must be made by the Statute of Descents and Distributions.

The judgments of the Special Term and of the Appellate Division should be reversed and the cause remitted to Special Term, with direction to enter judgment in accordance with opinion, costs to all parties payable out of the estate.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ., concur.

Judgment accordingly.

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WILLIAM H. ELLIS, Appellant, v. POLLY E. COLE et al., Respondents.

**CONTRACT—JUDGMENT CREDITOR'S SUIT—CONVEYANCE OF LANDS BY FATHER TO CHILDREN IN CONSIDERATION THAT LATTER PAY INCOME OF PROPERTY TO HIM FOR LIFE—WHEN DECREE IN JUDGMENT CREDITOR'S SUIT AGAINST FATHER AND CHILDREN DIRECTING PAYMENT OF PART OF INCOME TO CREDITOR DOES NOT RELIEVE CHILDREN FROM CONTRACT.** A father conveyed certain parcels of land to his daughters, who, in consideration thereof, agreed to apply the net income of said land, after deducting therefrom the interest on a mortgage of \$2,000, covering one of said parcels, to the support of their father during his life, and, in case the premises last described in the agreement should be sold, the proceeds thereof should be applied to the payment of said mortgage, or be invested and the interest thereon used and expended for the support of the father; two years later the daughters sold said "last described premises" for \$1,900, with which sum, and with \$100 of their own money, they paid the mortgage; subsequently a judgment creditor of the father brought an action to set aside the conveyance as fraudulent and void against the judgment; in such action the validity of the transfer was upheld, but it was decreed that the father was, as to the judgment creditor, the owner of a life estate in the lands conveyed to his daughters, subject to a lien of \$2,000, formerly represented by the mortgage, paid by the daughters; a receiver of the father's life estate was appointed and directed to pay, out of the income of the land in question, the interest on \$2,000, to the daughters, and apply the remainder on the judgment creditor's claim; after such judgment the daughters retained the whole of the interest paid to them by the receiver and failed to pay it over to, or apply it to the use of, the father; thereafter the father brought an action against his daughters to recover from them the interest on the \$1,900 of the mortgage, so retained by them; the Special Term awarded judgment in favor of the father, but the Appellate Division, by a divided court, has reversed

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it. *Held*, that the decree in the judgment creditor's suit did not relieve the daughters from their obligations to their father; while they were all parties to that suit no issue was raised between them and no claim for relief was made by either against the other, so that the decree therein could in no way adjudicate their respective rights under the agreement; the father is entitled, therefore, to the relief demanded and the order of the Appellate Division should be reversed and the judgment of the Special Term affirmed.

*Ellis v. Cole*, 105 App. Div. 48, reversed.

(Submitted April 5, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 3, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material are stated in the opinion.

*C. J. Huson, H. C. Harpending and H. B. Harpending* for appellant.

*M. A. Leary* for respondents.

CULLEN, Ch. J. On March 5th, 1894, the plaintiff entered into an agreement with the defendants, who are his daughters, whereby he conveyed to them certain pieces of real estate in the county of Yates, and the defendants, in consideration thereof, agreed to apply all the rents and profits of every kind received from said real estate, after deducting therefrom interest on a mortgage of two thousand dollars on one of said parcels of land and all taxes and necessary expenses, to the plaintiff for his support and maintenance during his natural life. It contained a further provision that in case the defendants should sell the premises last described in said agreement the moneys arising therefrom should be applied to the payment of the said two thousand dollar mortgage or be invested on bond and mortgage, and the interest accruing therefrom used and expended for the maintenance and support of the plaintiff. In 1898, Lydia Havens, a judg-

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ment creditor of the plaintiff, brought an action in the Supreme Court to set aside said conveyance as fraudulent and void against her judgment. In said action a judgment was rendered whereby the validity of the transfer from the plaintiff to the defendants was upheld, but it was decreed that William H. Ellis, the present plaintiff, was as to the plaintiff in that action the owner of a life estate in the premises first described in said deed "subject to the lien of two thousand dollars formerly represented by a mortgage upon said premises and heretofore paid and taken up by the defendants Ida Huches and Polly Cole." The judgment appointed a receiver of said life estate, directed that he pay out of the net income to the defendants Huches and Cole the interest on the two thousand dollar mortgage, and, after deducting such payment, apply the remainder of the income on the judgment recovered by the plaintiff in the action. Mrs. Huches and Mrs. Cole had, previous to the recovery of this judgment, sold one of the pieces of land for the sum of nineteen hundred dollars, and applied that sum, together with one hundred dollars of their own moneys, to the discharge of the two thousand dollar mortgage. After the rendition of the decree in the judgment creditor's action they retained the whole interest paid to them by the receiver appointed by that decree and failed to pay it over to or apply it to the use of the plaintiff. Thereafter, in May, 1903, the plaintiff brought this action to recover of the defendants the interest on nineteen hundred dollars of said mortgage so retained by them. The Special Term awarded judgment in favor of the plaintiff. The Appellate Division, by a divided court, has reversed this judgment and ordered a new trial. From that order this appeal is taken.

The agreement between the parties was in effect that the money realized by a sale of one of the pieces should be applied to the satisfaction of the mortgage resting on the other, or should be invested and the interest thereon paid to the plaintiff, and that the plaintiff should in one way or the other, either by the payment of the whole rents and profits

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to him or by the payment to him of the interest from the investment of the proceeds of sale, receive the annual rent of the property. This agreement the defendants were bound to carry out and cannot be relieved from their obligation to the plaintiff unless the plaintiff has been divested of his rights and claims against them by the decree in the suit brought by his judgment creditor. It is to be observed that, so far as appears by this record, no general receiver of all the plaintiff's property, assets and choses in action has been appointed, but merely a receiver of his interest in certain specified real estate, and the question, therefore, is, did the claim of the plaintiff to the interest of the sum realized from the real estate sold pass to this receiver. We think it did not. Had the proceeds of the sale been invested instead of applied to the satisfaction of the mortgage the proposition would be clear, but it was used to discharge the incumbrance on the property, the plaintiff's life estate in which was declared to be subject to the lien of his creditor's judgment. The mortgage was discharged before the rendition of the decree in the judgment creditor's action, as appears by the terms of that decree. This being the status of the property, we think it clear that the judgment creditor might have had appropriated the whole annual income of the property to the satisfaction of her judgment, but she either did not seek that result or did not succeed in obtaining it. She secured only the excess of the annual income above the interest on the amount of the mortgage formerly resting on the property. She seems to have been content with what she got, and we are at a loss to discover how the fact that the judgment creditor did not take from the plaintiff all that she might have taken can relieve the defendants from paying to the plaintiff that part of their obligation to him which his judgment creditor did not seize. The decree could not relieve the defendants from their obligation under the contract. True, both the present plaintiff and the defendants were defendants in that action. There was no issue raised between the defendants and no claim for relief made by either against the other, and, therefore, the decree

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in the action could in no way adjudicate their respective rights. The result that would flow from the decision below is that the plaintiff would neither receive the annual sum the defendants agreed to pay to him nor would he have that sum applied to his debt, while the defendants would be enabled to retain moneys to which they are in no way entitled.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in both courts.

O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; Hiscock, J., not sitting.

Order reversed, etc.

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**GEORGE BUCKLEY, Respondent, v. CITIZENS' INSURANCE COMPANY OF MISSOURI, Appellant.**

**1. FIRE INSURANCE — PAYMENT OF PREMIUM ON POLICY — WHEN CREDIT GIVEN TO INSURED BY AGENT REGARDED AS PAYMENT TO COMPANY.** Where the general agent of a fire insurance company at the time of issuing a policy, gives credit to the insured for the premium due on the policy, and the amount thereof is charged by the company to the agent who pays it in a subsequent settlement with the company, the premium, as between the company and the insured, must be regarded as paid.

**2. CANCELLATION OF POLICY — VOLUNTARY AND UNCONDITIONAL SURRENDER OF POLICY SUBSEQUENT TO NOTICE OF CANCELLATION — WHEN REGARDED AS A WAIVER OF REQUIREMENT THAT UNEARNED PREMIUMS MUST BE PAID OR TENDERED BEFORE POLICY CAN BE CANCELED.** Under the provisions of the New York standard policy of fire insurance relating to the cancellation of the policy, if the insurance company desires to cancel the policy, it must not only give the five days' notice therein required but accompany it by the payment or tender of the *pro rata* amount of the unearned premium; it cannot legally demand of the insured the surrender of the policy and its cancellation until this is done; but where the agent who issued the policy in question sent the required notice of cancellation to the insured with a request that he return the policy to the office of the agent, upon which the unearned premium, if any, would be returned to him *pro rata*, and thereupon the insured voluntarily and unconditionally surrendered the policy to the agent, this action must be regarded in law as a waiver, by insured, of his right to treat the policy as in full force and effect until the company paid or tendered to him the unearned premium; the company is not liable under the policy, therefore,

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upon the subsequent destruction, by fire, of the buildings insured by the policy, although the unearned premium has never been paid or tendered to the insured, but the latter can sue for the amount due.

*Buckley v. Citizens' Ins. Co.*, 112 App. Div. 451, reversed.

(Argued April 10, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 9, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Horace McGuire* for appellant. The policy was effectually canceled before the fire. (*Van Valkenburgh v. Lennox*, 51 N. Y. 465; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417; *Nitsch v. A. C. Ins. Co.*, 152 N. Y. 635; *Tisdell v. N. H. Ins. Co.*, 155 N. Y. 163; *S. & S. Co. v. Phoenix*, 31 Ins. L. J. 483; *Walthear v. P. F. Ins. Co.*, 2 App. Div. 328.) The policy was canceled by agreement. (*Springer v. v. A. N. Assur. Co.*, 33 N. Y. S. R. 543; *Ostrander on Fire Ins.* 571, 579; *Boehn v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460.)

*Edward C. Rice* for respondent. The premium was actually paid within the meaning of the policy. (*Hendrick v. Lindsay*, 93 U. S. 143; *B. L. Ins. Co. v. Miller*, 12 Wall. 285; *White v. C. Ins. Co.*, 120 Mass. 330; *McAllister v. N. E. L. Ins. Co.*, 101 Mass. 558; *Jurgens v. N. Y. L. Ins. Co.*, 114 Cal. 161; *Battle v. Coit*, 26 N. Y. 404; *Train v. H. Ins. Co.*, 62 N. Y. 598; *Sheldon v. C. L. Ins. Co.*, 25 Conn. 542; *Teal v. Spangler*, 72 Ind. 384; 2 Daniel's Neg. Inst. [5th ed.] 1221; *A. Bank v. Hunsiker*, 72 N. Y. 252.) There could not be an effective cancellation of the policy at the instance of the defendant without actual payment or tender to the plaintiff of the unearned premium. (*Tisdell v. N. H. F. Ins. Co.*, 155 N. Y. 163; *Van Valkenburgh v. L. Ins. Co.*, 51 N. Y. 465; *Griffey v. N. Y. C. Ins. Co.*, 100 N. Y.

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420; *Lattan v. L. Ins. Co.*, 45 N. J. L. 453.) There was not a legal surrender of the policy by the insured. (*Griffey v. N. Y. C. Ins. Co.*, 100 N. Y. 417, 420; *Tisdell v. N. H. Ins. Co.*, 155 N. Y. 163; *Train v. H. Ins. Co.*, 62 N. Y. 602; *Crown Pt. v. A. Ins. Co.*, 53 Hun, 226; 127 N. Y. 617; *Hathorn v. G. Ins. Co.*, 53 Barb. 28; *Von Wien v. S. U. & M. Ins. Co.*, 118 N. Y. 94, 101; *Hickey v. H. Ins. Co.*, 36 N. Y. Supp. 330; *F. C. Works v. W. Ins. Co.*, 36 Chicago Leg. News, 201.)

EDWARD T. BARTLETT, J. The defendant company is located in the state of Missouri, and its general agents in this state at the time of the transactions involved in this action were Becker & Company, of Little Falls, Herkimer county. The plaintiff Buckley was the owner of a hotel located at Big Moose, a hamlet in the Adirondacks. On the 12th of April, 1903, the defendant issued its policy of insurance, for the term of one year from date, covering this hotel for the amount of \$625.00. There was other insurance upon the building, the total amount being \$2,500.00. On the night of the fifth of July following the building was totally destroyed by fire. The defendant company resists the payment of this claim on the ground that the policy was canceled and not in force at the time of the fire.

A preliminary question is presented as to whether the premium under this policy had been paid at the time of the loss. Becker & Company, the general agents of the defendant, transacted their business with it as follows: They made a daily report to the defendant in Missouri as to any policies they had written and on receipt thereof the company charged them with the amount of premium on each policy. At the end of sixty days the defendant rendered to its general agents a bill for the total premiums that had accumulated during that period, and the latter paid the same without regard to any arrangements they might have made with the insured as to credit on the payment of premium.

The premium on the policy in suit amounted to \$24.38.

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Becker & Company, at the time of issuing the policy, gave the plaintiff credit for this payment. This amount together with the premiums on the policies in two other companies issued at the same time on the same property was \$97.51. The plaintiff also owed Becker & Company \$100.00, premiums on policies on other property. In payment of these two items the plaintiff, on or about May 20th, 1903, gave to Becker & Company his note for \$197.50, dated May 20th, 1903, payable three months after date to the order of Becker & Company at the First National Bank of Reinsen, with interest. Becker & Company soon after receiving this note indorsed it and procured its payment at a bank in Little Falls and received the proceeds thereof. The bank held the note until its maturity on August 20th, 1903, when it was taken up by Becker & Company, and they still hold it. The \$100.00 item, not involved in this action, has been paid by plaintiff. The court found that the premium on the policy in question was charged to Becker & Company by the defendant company in its April account. The full amount of this account was paid by Becker & Company to defendant in August following. The defendant, on the return to it of the policy, credited its agents with the amount of the unearned premium, and this credit would appear in the July account to be subsequently paid.

In view of these transactions it is clear that as between the plaintiff and the defendant company the premium on the policy in suit was paid at the time the credit was given.

On the 23rd of June, 1903, Becker & Company mailed to the plaintiff a notice sent by them and dated June 20th, 1903, stating that the policy, describing it, "is hereby canceled from and after five days of the date hereof; this notice being given pursuant to the condition contained in said policy, of which the following is a copy, to wit: 'This policy shall be canceled at any time at the request of the assured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the

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unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium.' You are requested to return said policy to this office accordingly, when the unearned premium, if any be due, will be returned to you *pro rata*, as provided in said condition."

It is found that this notice was received by the plaintiff on the 23rd or 24th of June, and that on or about the 26th of June the plaintiff mailed to Becker & Company the policy, no letter or communication being sent with it. There is nothing in the findings to show that this surrender of the policy was in any way conditional. The unearned premium was not paid to the plaintiff before the fire or at any time, nor was it ever tendered. The policy was returned by Becker & Company to the defendant company after the fire and on July 7th, 1903.

The question is, therefore, presented as to the effect upon plaintiff's cause of action of this voluntary and unconditional surrender of the policy to the defendant. The respondent's counsel argues that there could not be an effective cancellation of the policy at the instance of the defendant without actual payment or tender to the plaintiff of the unearned premium, and cites in support of this proposition the case of *Tisdell v. New Hampshire Fire Ins. Co.* (155 N. Y. 163). In the case cited the defendant admitted that the policy in suit had not been surrendered or tendered to it by the insured and that no demand had been made for the return of the premiums or the unearned portion thereof. In that case the opinion of this court states: "The question presented on this appeal is no longer an open one in this court. It was decided in the case of *Nitsch v. American Central Insurance Company* (152 N. Y. 635), affirmed in this court without an opinion. In that case, as in this one, the question presented was, whether the provision of the New York standard policy of fire insurance, relating to the cancellation of the policy at the instance of the company, requires that, in addition to

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giving the five days' notice, the company must return or tender the unearned premium in order to effect a cancellation. The answer was in the affirmative. The only question presented for consideration in this case, therefore, is whether the defendant returned or tendered the unearned premium." As it appeared that there was no return or tender of the unearned premium this court held in the cases of *Nitsch* and *Tisdell* that the provision of the standard policy relating to the cancellation of a policy at the instance of the company requires that in addition to giving five days' notice the company must return or tender the unearned premium in order to effect a cancellation.

The case at bar differs from the above cases, as already pointed out, by reason of the additional fact that the plaintiff had voluntarily and unconditionally surrendered his policy immediately on receiving the notice of cancellation. We are of opinion that this action on the part of the plaintiff must be regarded in law as a waiver of his right to treat the policy as in full force and effect until the company paid or tendered to him the unearned premium. The one object of the cancellation clause is to place the policy in the custody of the insurance company absolutely and unconditionally. If the insured permits this to be done by his voluntary act, when the company gives notice of cancellation without receiving from it the unearned premium he assents to the cancellation, but can sue for the amount due him. It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the standard policy. The situation is not a complicated one and the court desires to so construe the clause that its meaning may be made clear. If the insurance company desires to cancel it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or tender of the *pro rata* amount of the unearned premium; it cannot legally demand of the insured the surrender of the policy and its cancellation until this is done. If, on the other hand, the insured desires to terminate the contract, he must give the notice of cancella-

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tion, allow the company to retain the customary short rate of unearned premium and surrender the policy. If the company fail, on demand, to pay the balance of premium due he can sue and recover the same. These views lead to reversal.

The judgment appealed from should be reversed and a new trial granted, with costs to abide event.

VANN, J. (dissenting). I concur in the conclusion that as between the plaintiff and the insurance company the premium in question was paid before the fire occurred. When the agents in the ordinary course of their business with the plaintiff gave him credit, he no longer owed the company but owed them the amount of the premium.

Cancellation of the policy was authorized "at any time at the request of the assured, or by the company by giving five days' notice." In either event, as the contract further provided, "the premium having been actually paid, the unearned portion shall be returned on surrender of this policy." Whether the insurer or the insured is the actor in the attempt to cancel, cancellation is not complete until the unearned premium is returned. (*Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y. 163, 165.) If the insured is the actor, the surrender of the policy and the return of the premium are concurrent acts. If the insurer is the actor, the notice and the return of the premium are sufficient, for the insured might be unwilling to surrender the policy. If, however, after the insurer has given the notice, the policy is surrendered by the insured, return of the premium must be made concurrently, or, if the surrender is by mail, as soon as practicable, unless such return is duly waived. In the case before us the company treated the act of surrender and the act of returning the premium as concurrent in the notice served by its agents, for they therein requested him "to return said policy to this office, when the unearned premium, if any be due, will be returned to you." Pursuant to this notice, the insured mailed the policy to the agents without instructions or comment, and the premium had not been returned or tendered when the

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fire occurred, although there was both time and opportunity to do so.

Under these circumstances, is the question of waiver one of fact or law? The learned referee treated it as one of fact, for he found that "the unearned premium (being the sum of \$19.30) was not paid or tendered to the plaintiff before the fire, and the plaintiff did not at any time waive such payment or tender." In his opinion he gave his reasons in part for so finding as follows: "Presumptively the return of the policy to Becker and Company was in compliance with the request in the notice, in order to obtain the unearned premium, and was not an assent to a cancellation without the performance by Becker and Company of what they had expressly offered to do in the notice. No intent of that kind can properly be inferred."

As, according to the policy, surrender and return are concurrent acts so far as practicable, in the absence of evidence to the contrary the former is presumed to be made upon the condition that it shall not take effect until the latter is performed. While the surrender was voluntary it was not volunteered, for it was made upon the request of the company contained in a notice of intent to cancel, and accompanied with the statement that the premium would be returned "when" the policy was returned. The policy was returned, but the premium was not, although the agents had an interview with the plaintiff after the surrender and before the fire. Moreover, at that interview the agents expressly agreed to hold the policy until it was placed in another company. It was not placed in another company, but held by the agents until after the fire, when it was sent to the defendant.

In my opinion there was no waiver as matter of law, and the referee having found upon sufficient evidence that there was no waiver as matter of fact, the judgment should be affirmed.

CULLEN, Ch. J., O'BRIEN, HAIGHT and HISCOCK, JJ., concur with EDWARD T. BARTLETT, J.; CHASE, J., concurs with VANN, J.

**Judgment reversed, etc.**

**CHARLES H. JOHNSON, Respondent, v. SAMUEL B. GRENELL,  
Appellant.**

**REAL PROPERTY—WHEN CONVEYANCE OF LOT FRONTING ON ROADWAY RUNNING ALONG AND EXTENDING TO THE WATERS OF A NAVIGABLE RIVER CONVEYS TITLE TO ROADBED AND APPURTEnant RIPARIAN RIGHTS.** Where the owner of an island in a navigable river, which had been laid out into lots, with boulevards, streets and roads, according to a map upon which the lots were designated by numbers, sold a lot abutting upon a boulevard running along and extending to the waters of the river, the lot being conveyed as "lot numbered 34 as laid out on the map," with a description so indefinite and ambiguous that reference must be made to the map to ascertain the dimensions and boundaries of the lot, and the deed contains no language from which it can be inferred that the grantor intended to reserve any interest in the fee of the boulevard itself or in the appurtenant riparian rights, the legal title to the whole of the boulevard in front of the lot in question, together with the riparian rights, passed to the grantee of the lot, subject only to the public easement or right of passage over the boulevard.

*Johnson v. Grenell*, 112 App. Div. 620, affirmed.

(Argued May 3, 1907; decided May 10, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 5, 1906, reversing a judgment in favor of defendant entered upon the report of a referee and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John O'Leary* for appellant. The fee in the northerly one-half of the lands of South boulevard adjacent to the easterly one-half of lot 34 is all that plaintiff can reasonably claim. (*Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Perrin v. N. Y. C. R. R. Co.*, 36 N. Y. 121; *Graham v. Stern*, 168 N. Y. 521; *Mott v. Mott*, 68 N. Y. 253; *Watson v. City of New York*, 67 App. Div. 579.) A deed of land bounded on a highway and described as corners and distances and bounds excludes the highway, when it contains what it purports to

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without the highway. (*K. C. F. Ins. Co. v. Stevens*, 87 N. Y. 292; *B., N. Y. & E. R. R. Co. v. Stigler*, 61 N. Y. 351; *Mott v. Mott*, 68 N. Y. 247; *Blakman v. Riley*, 138 N. Y. 318; *White's Bank v. Nichols*, 64 N. Y. 65; *Kennedy v. M., H. & F. T. Co.*, 77 App. Div. 484; 178 N. Y. 508; *Wendall v. People*, 8 Wend. 183; *Van Wyck v. Wright*, 18 Wend. 158; *Drew v. Swift*, 46 N. Y. 207; *Jackson v. Hathaway*, 15 Johns. 453.) The defendant has not parted with the fee in South boulevard and is in possession of all riparian rights. To deprive defendant of the water rights on the shore of South boulevard, plaintiff must show an absolute title in fee of all the lands embraced herein in himself. (*T. I. S. Co. v. Visger*, 86 App. Div. 136; *Saunders v. N. Y. C. R. R. Co.*, 144 N. Y. 75; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79.)

*V. K. Kellogg* for respondent. The conveyance from Lucy M. Grenell to Hopkins and Chamberlain of lot 34 conveyed the entire boulevard in front of that lot, and the riparian rights incidental thereto, to the grantees. (*Jackson v. Hathaway*, 15 Johns. 447; *Gorham v. E. El. Co.*, 80 Hun, 290; *Hennessy v. Murdock*, 137 N. Y. 317; *Mangam v. Sing Sing*, 11 App. Div. 212; *Edsall v. Howell*, 86 Hun, 424; *Village v. Cowan*, 4 Paige, 513; *Graham v. Stern*, 168 N. Y. 521; *Mott v. Eno*, 97 App. Div. 611; *Gere v. McChesney*, 84 App. Div. 41; *Brewing Co. v. Wharf Co.*, 59 App. Div. 92; *Paige v. S. Ry. Co.*, 178 N. Y. 102; *Miller v. N. Y., etc., Ry. Co.*, 183 N. Y. 123; *Lowenberg v. Brown*, 79 App. Div. 414.)

GRAY, J. In 1865, Lucy M. Grenell purchased an island in the St. Lawrence river and she caused the same to be laid out into lots, with boulevards, streets and roads; according to a map which she made and filed. Upon this map the lots were numbered and, in 1894, she sold to Hopkins & Chamberlain "the lot numbered 34 as laid out on the map of the Grenell Island Park, the lot laying (sic), on the South east shore and

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adjoining lot 175, on the south west of lot now deeded to Widener, the lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less." Thereafter, in 1897, Hopkins & Chamberlain conveyed the same lot, by the same description, to Robbins. In 1901 Robbins conveyed to this plaintiff "the east one-half of lot number 34 as laid down on a map of Grenell Island Park, said lot being on the south-east shore \* \* \* together with the dock and dockage in front of said lot and the water rights acquired and used by parties of the first part and the boat house on said lot and dock" etc. "South Boulevard" upon the Grenell map extends along the southerly shore of the island and intervenes between lot 34 and the river; being 50 feet in width. While Robbins owned the lot he constructed on the shore, in front of it, a crib dock, upon the westerly end of which he placed a building. Subsequently, another person, a stranger to the title, placed a building upon the easterly end of the dock and paid the Grenells a rental. After the plaintiff had acquired the easterly half of the lot, he purchased the building in front of it upon the dock. He then commenced this action to determine the title to the street in front of his land. The defendant was the husband of Mrs. Grenell, the original owner, who has succeeded to all her right and title, as the devisee under her will. He claims that no part of the land in the boulevard was conveyed by his wife's deed to Hopkins & Chamberlain and denies any right in the plaintiff to possess, or to use, the shore. He succeeded in recovering a judgment establishing his title to the south half of the boulevard and to the riparian ownership. This judgment, however, was reversed by the Appellate Division; where it was held, the court being divided in opinion, that, upon the facts, the plaintiff was shown to be the possessor of the legal title to the street and to the boat house and dock; subject, as to the street, to the exercise of the public easement.

I think that the determination by the Appellate Division was correct. So far as the description of the premises included dimensions, they may be disregarded, as affecting, or

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limiting, the land conveyed. The words "lot 126 feet front and 68 feet deep, supposed to contain 60 by 100 feet, the same more or less," if not meaningless, are too ambiguous. What the original deed of Mrs. Grenell intended to grant was to be ascertained from her map. It conveyed a piece of land known as lot No. 34 on the map, being on the southeast shore, with a road in front of it extending to the waters of the river. Had the grantor intended to reserve the land in the roadway, or any part of it, she could have done so; but there is an absence of any language, from which such an intention could be implied. Indeed, there is no sufficient reason apparent to infer an intention by the grantor, when parting with her title to the only land adjoining the road, to reserve any interest in the fee of the road itself. Manifestly, from the facts, an inducement to the purchaser of the lot was its being shown, and stated, to lie upon the shore of the island and the enjoyment of the riparian advantages conferred a distinct value. The ordinary presumption is that, in the absence of contradictory terms, the grantor does not intend to retain the fee of the soil in the street. (*White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 70.) The grantees of Mrs. Grenell, in this case, had the right to rely upon the application of the rule that a grantor will not be supposed to have reserved the title to the road bounding a grant of lands, if its control ceased to be of importance to him by reason of his having parted with all of his interest in the lands adjoining it. (*Haberman v. Baker*, 128 N. Y. 253.) That Mrs. Grenell's grantees took by her deed, certainly, one-half of the road was conceded and had she owned any land upon the other side of the road, the other adjoining half of the road would have remained hers. As we have seen, that was not the case and the defendant cannot claim that any riparian rights remained in his predecessor in the title. In the absence of anything expressing a contrary intention, those rights follow a grant of the uplands.

It was held in *Haberman v. Baker*, (*supra*), that "where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subse-

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quent grant of the adjoining land should be deemed to comprehend the fee in the whole roadbed, upon the same principle that exists for giving the fee to the center in other cases." In the present case the control of the boulevard, which had ceased to be of importance to Mrs. Grenell after she had parted with the adjoining land, was important and essential to her grantees, for obvious reasons connected with their full enjoyment of the premises.

In the cases of *Bissell v. N. Y. C. R. R. Co.*, (23 N. Y. 61); *Haberman v. Baker*, (*supra*), and *Graham v. Stern*, (168 ib. 521), will be found ample support for the doctrine that in the case of such a grant as this record presents, in legal intendment, the grantor conveyed her property in the whole road bounding the premises granted.

I advise that the order appealed from be affirmed and, under the stipulation of the appellant, that judgment absolute be ordered for the respondent, with costs in all the courts.

CULLEN, Ch. J., O'BRIEN, VANN, WERNER and WILLARD BARTLETT, JJ., concur; CHASE, J., dissents.

Ordered accordingly.

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**LOTTIE GAINES, Appellant, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Respondent.**

**1. INSURANCE (LIFE OR ACCIDENT)—WHEN MATERIALITY OF FACT STATED TO BE TRUE IN APPLICATION FOR POLICY IS OF NO CONSEQUENCE.** Where a fact is stated in answer to a question propounded in an application for a life, or accident, insurance policy, the materiality of the fact stated by the assured is of no consequence, if the contract be that the matter is as represented, and unless it prove so, whether from fraud, mistake, negligence or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the assured can have no claim.

**2. ACCIDENT INSURANCE—WHEN FINDING BY JURY THAT PAYEE OF ACCIDENT POLICY WAS NOT THE WIFE OF THE ASSURED, AS STATED IN HIS APPLICATION FOR THE POLICY, PRECLUDES RECOVERY.** Where the assured, in his application for a policy insuring him against bodily injury, the application being made a part of and the basis of the

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policy, or contract, of insurance, stated in answer to a question as to the "relationship" of the payee, or beneficiary, named in the policy, that she was his wife, and it was found by the jury, upon the trial of an action brought on the policy, after the death of the assured, caused by a pistol shot fired by another, that the payee was not the wife of the assured; she cannot recover, since the insurer was entitled to know the actual relationship, which the person, for whom the assured desired the benefit of the insurance contract, sustained to him; for it bore upon the risk which it was to assume. The inquiry related to the risk; the statement in the answer was made a warranty to be contained in the policy and, it having been determined that the statement was untrue, the right to recover upon the contract was forfeited.

*Gaines v. Fidelity & Casualty Co.*, 111 App. Div. 886, affirmed.

(Argued April 19, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 16, 1906, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Alfred C. Cowan* for appellant. Error was committed by the Appellate Division in affirming the finding of the jury on the assumption that the jury had answered the second question submitted to it, viz.: Was the deceased intentionally killed, in the affirmative, as, if the jury had so found it should, under the instructions of the court, have found for the plaintiff in the sum of sixteen dollars. (*Carpenter v. Taylor*, 164 N. Y. 180; *McGuire v. Bell Telephone Co.*, 167 N. Y. 208; *Ives v. Ellis*, 169 N. Y. 85; *Bank of State of N. Y. v. S. Nat. Bank*, 170 N. Y. 1, 5.) The motion for a new trial on the ground of newly-discovered evidence should have been granted, and the order denying the motion should be reversed and a new trial granted. (*Conlon v. Mission, etc.*, 87 App. Div. 165; *Guyot v. Butts*, 4 Wend. 580; *Parshall v. Klinck*, 43 Barb. 203; *Cole v. F. B. C. Co.*, 16 N. Y. Supp. 780; *W. S. P. Co. v. Barclay*, 48 Hun, 54; *Clegg v. N. Y. N.*

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*Union*, 51 Hun, 232; 129 N. Y. 638; *Vollkommer v. N. E. R. R. Co.*, 23 App. Div. 88; *Kring v. N. Y. C. & H. R. R. R. Co.*, 45 App. Div. 373; *Hess v. Sloan*, 47 App. Div. 585; 173 N. Y. 616; *Bulkin v. Ehret*, 29 Abb. [N. C.] 64; 20 N. Y. Supp. 731.) The trial judge committed error in charging that plaintiff cannot recover unless she proves she was the lawful wife of Ulysses Gaines. (*W. L. Ins. Co. v. Haney*, 10 Kan. 525; *Badger v. Badger*, 88 N. Y. 546; *Gall v. Gall*, 114 N. Y. 109; *Benjamin v. C. I. Assn.*, 44 La. Ann. 1017; *Lampkin v. Travelers' Assn.*, 11 Col. App. 249; *Spencer v. C. M. L. Assur. Assn.*, 142 N. Y. 505; *Jones v. B. L. Ins. Co.*, 61 N. Y. 79; *Davis v. Supreme Lodge*, 35 App. Div. 354; *Dougherty v. M. L. Ins. Co.*, 3 App. Div. 313; *Spitz v. M. B. L. Assn.*, 5 Misc. Rep. 245.)

*Charles C. Nadal* for respondent. If the plaintiff was not the wife of Gaines when the policy was issued there was a clear breach of warranty. (May on Ins. [4th ed.] § 156; *Clemens v. Royal Society*, 131 N. Y. 485; *Clements v. C. I. Co.*, 29 App. Div. 131; *Cushman v. U. S. L. Ins. Co.*, 63 N. Y. 404; *Makel v. H. M. L. Ins. Co.*, 95 App. Div. 241; *Foot v. A. L. Ins. Co.*, 61 N. Y. 571; *Dwight v. G. L. Ins. Co.*, 103 N. Y. 341; *Foley v. Royal Arcanum*, 151 N. Y. 196; *Roche v. Supreme Lodge K. of H.*, 21 App. Div. 599; *Sternaman v. M. L. Ins. Co.*, 49 App. Div. 473; *Schane v. M. L. Ins. Co.*, 76 App. Div. 271.) An order denying a motion for a new trial on the ground of newly-discovered evidence is not reviewable in the Court of Appeals. (*White v. Benjamin*, 150 N. Y. 258; *Smith v. Platt*, 96 N. Y. 634; *Dalrymple v. Hannum*, 54 N. Y. 654; *Baker v. Remington*, 45 N. Y. 323; *Reilly v. D. & H. C. Co.*, 102 N. Y. 383.)

GRAY, J. The policy in question insured Ulysses Gaines against bodily injury, resulting in death, in the sum of \$2,000. It stated that the defendant insured him "in consideration of \* \* \* the statements in the schedule hereinafter contained, which statements the insured makes on the acceptance of this policy and warrants to be true." The warranties con-

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tained in the schedule of the policy included the statement, in answer to a question as to the "relationship" of this plaintiff, whom the insured had named as the payee, that she was his wife. The assured was killed by a pistol shot, fired by another, and this action by the plaintiff, as the beneficiary named in the policy, was defended upon the ground, among others, that there had been a breach of the warranty; in that she was not the wife of the assured. The result of the trial was that the jury found a verdict in favor of the defendant upon this question of fact and the unanimous affirmance of the judgment thereupon is conclusive.

The question of law, which has survived, is raised by exceptions taken by the plaintiff to the charge of the trial court that she could not recover unless she was, at the time of the insurance, the wife of the person assured. As the question of fact was submitted to the jurors by the trial judge, they were to determine whether there was any agreement between the assured and the plaintiff to enter into the marital relationship and, if there was, whether, the plaintiff's prior marriage to another having been conceded, she was "capable of entering into that relationship;" that is, "had she married the assured in good faith believing her husband to be dead."

The question of the avoidance of the contract, under the clause of the policy relating to injuries intentionally inflicted by another upon the insured, was within the issues of the case; but the instructions to the jurors required them, if they decided for the defendant upon that defense, to return a verdict for the plaintiff for \$16.00, the amount of the premium, according to the terms of the policy.

The argument of the appellant, in substance and effect, is that the representation of the assured that Lottie Gaines was his wife was not material and should be considered as matter of description and not of warranty. This was, however, a distinctly expressed warranty, the truth of which was a condition of liability and was of the basis of the contract itself. The effect of making the statement a part of the policy and of warranting it to be true was, in law, to induce the defend-

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ant's agreement to insure and the statement became material. It is a general rule, and one which the decisions of this court have asserted, that the materiality of the fact stated by the assured is of no consequence, if the contract be that the matter is as represented, and that unless it prove so, whether from fraud, mistake, negligence or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the assured can have no claim. (May on Insurance, sec. 156; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571, 577; *Cushman v. U. S. Life Ins. Co.*, 63 ib. 404, 409; *Donley v. Glens Falls Life Ins. Co.*, 184 ib. 107.) The author of the text book cited well observes: "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement." The parties to this contract had the right to make any statements of fact material thereto and conditions precedent to any liability thereupon, all things being equal at the time in their attitude to each other, and if they proved false the contract was avoided. The insurer was entitled to know the actual relationship, which the person, for whom the assured desired the benefit of the insurance contract, sustained to him; for it bore upon the risk which it was to assume. The inquiry related to the risk; the statement in the answer was made a warranty to be contained in the policy and, it having been determined that the statement was untrue, the right to recover upon the contract was forfeited.

The motion for a new trial, upon the ground of newly-discovered evidence, was addressed to the discretion of the court below and the order denying it is not reviewable in this court. (*Lawrence v. Ely*, 38 N. Y. 42; *Smith v. Platt*, 96 ib. 635.)

None of the exceptions taken by the appellant presents any error, for which a new trial should be ordered, and I, therefore, advise the affirmance of the judgment appealed from, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT J., not sitting.

Judgment affirmed.

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WINANT W. WEIR, Respondent, *v.* UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.

1. DAMAGES—ELEMENTS OF DAMAGES IN ACTIONS FOR PERSONAL INJURIES—WHEN LOSS OF INCOME MAY BE SHOWN AND CONSIDERED—MERE PROFITS OF BUSINESS CANNOT BE CONSIDERED. Where a person by reason of personal injuries has been prevented from performing the work or services in which he was engaged at the time of the injury, the loss of time occasioned thereby and also any loss or diminution of future earning power are elements of damage to be considered by a jury. A loss of income can be shown and considered when such income is derived from personal effort or particular skill and ability as distinguished from the profits of a business in which capital is invested and which is dependent upon the continuance of the business as well as the capital, but mere profits of a business as such cannot be considered in measuring the damages arising from such loss of time or diminution of earning power.

2. SAME—ERRONEOUS ADMISSION OF EVIDENCE TENDING TO SHOW LOSS OF PROFITS CAUSED BY PERSONAL INJURY TO OWNER OF BUSINESS. Where the plaintiff, in an action to recover damages for personal injuries, was engaged at the time of the injury in conducting a small restaurant, or lunch business, at which oysters and clams, opened as they were ordered, were the principal articles of food sold, and there is no evidence showing that any particular skill or ability was required in the management of the business or that the plaintiff had any particular skill or ability in opening oysters and clams or in serving food to others, it is reversible error to permit the plaintiff to testify as to the profits of the business before his injury; the evidence should have been confined to the value of the plaintiff's individual services during the time that he was unable, by reason of his personal injuries, to perform the same.

*Weir v. Union Ry. Co.*, 118 App. Div. —, reversed.

(Argued April 30, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 26, 1907, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Charles F. Brown, Henry A. Robinson, Bayard H. Ames and Anthony J. Ernest* for appellant. The trial justice erred

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in his ruling upon evidence and in his instructions to the jury. (*Kronold v. City of New York*, 186 N. Y. 40; *Masterton v. Vil. of Mt. Vernon*, 58 N. Y. 391; *Marks v. L. I. R. R. Co.*, 14 Daly, 61; *B. & A. R. R. Co. v. O'Reilly*, 158 U. S. 334; *Blate v. T. A. R. R. Co.*, 29 App. Div. 388; *Hewlett v. B. H. R. R. Co.*, 63 App. Div. 422; *Read v. B. H. R. R. Co.*, 32 App. Div. 503; *Johnson v. M. Ry. Co.*, 52 Hun, 111; *Jonas v. I. St. Ry. Co.*, 90 N. Y. Supp. 1070.)

*J. Stewart Ross* for respondent. The objections were properly overruled, and the testimony objected to properly received. (*Kronold v. City of New York*, 186 N. Y. 43; *Thomas v. U. Ry. Co.*, 18 App. Div. 185; *Pill v. B. H. R. R. Co.*, 6 Misc. Rep. 267; 148 N. Y. 747; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Lynch v. B. C. R. Co.*, 5 N. Y. Supp. 311; *Waldie v. B. H. R. R. Co.*, 78 App. Div. 557; *Nash v. Sharpe*, 19 Hun, 365.)

CHASE, J. The plaintiff recovered judgment in this action against the defendant for personal injuries resulting from the fall of a fare indicator or register in one of defendant's street cars on which the plaintiff was a passenger. An appeal was taken from said judgment to the Appellate Division of the Supreme Court, where it was unanimously affirmed. The appeal is taken to this court pursuant to an order of the said Appellate Division allowing the same, and in which order it is certified that, in the opinion of the court, a question of law is involved which ought to be reviewed by this court.

The only question of law involved arises upon rulings of the trial court upon objections to questions involving the profits of the business conducted by the plaintiff.

The plaintiff, who is usually employed as a boatman, had for six or seven months prior to the accident rented a room which immediately adjoined the street along the side of a liquor store. In the room, the dimensions of which were five by sixteen feet, he conducted a lunch business and sold oysters, clams, crabs, lobsters, beef stew and fish. There were sittings

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in the room for six or eight people and the food was eaten by purchasers at the plaintiff's place of business. During some portion of the time that he was conducting such business he employed therein two or three men and at the time of the accident he was employing one man. Oysters and clams were opened as ordered, and they were the principal articles of food sold, and the plaintiff purchased them by the barrel. The supplies purchased by the plaintiff varied in price and the amounts sold varied to such an extent that the number of persons employed had to be changed from time to time. It does not appear that it required any particular skill or ability to do the work of managing the business that the plaintiff was conducting, or that the plaintiff had any particular skill or ability in opening oysters or clams or in serving food to others.

The trial court allowed the plaintiff to testify that he was doing a business of about \$120 and sometimes \$140 a week, and that his expenses each week for help were \$10 or \$12, and for stock \$40, and that his rent was \$10 a month, and that the remainder of the proceeds of his business was profit. This testimony was given subject to objections on the part of the defendant that it was incompetent, immaterial and irrelevant and as calling for special damages not pleaded by the plaintiff, and that it related to a business in which the plaintiff had capital invested. The objections of the defendant were overruled, and the defendant excepted to the ruling of the court.

Where a person by reason of personal injuries has been prevented from performing the work or services in which he was engaged at the time of the injury, the loss of time occasioned thereby and also any loss or diminution of future earning power are elements of damage to be considered by a jury. A loss of income can be shown and considered when such income is derived from personal effort or particular skill and ability as distinguished from the profits of a business in which capital is invested and which is dependent upon the continuance of the business as well as the capital, but mere profits of a business as such cannot be considered in measuring the dan-

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ages arising from such loss of time or diminution of earning power. In this case the business did not require a large capital or many employees, but the questions expressly called for the profits of a business and not for the value of plaintiff's personal services in connection therewith. This is apparent from all the testimony in the case, and it is particularly shown from the fact that it had been the practice of the plaintiff to leave the business with his employees when he was absent, and from the further fact that the business was continued for several weeks after the accident, although the plaintiff was not personally present. At the time when the plaintiff, as he says, wound up the business he had sufficiently recovered, so that he went to the office of his physician frequently for treatment, and it does not appear that the plaintiff could not have continued the business by the employment of help until he had fully recovered, or until he could have attended at the place of business to supervise the same. The testimony should have been confined to the value of the plaintiff's individual services during the time that he was unable, by reason of his personal injuries, to perform the same.

In *Masterton v. Village of Mt. Vernon* (58 N. Y. 391, 396) the court, referring to cases therein mentioned, say: "In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages." In referring to the case of *Walker v. Erie R. Co.* (63 Barb. 260), in which it was held that proof of the amount of the income derived by the plaintiff in that action in the practice of his profession as a lawyer was competent, the court say: "This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended." The court further say: "The profits of importing and selling teas are still more uncertain. In some years they may be large,

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and in others attended with loss. The plaintiff had the right to prove the business in which he was engaged, its extent and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time."

In this case the profits of the business were subject to many uncertainties and contingencies, among which were his ability to continue the business in the place and as theretofore conducted, the amount of competition that he might at any time encounter and the variation in the price of supplies to be purchased. The respondent refers to the recent case of *Kronold v. City of New York* (186 N. Y. 40) as sustaining his contention. In that case, although the plaintiff maintained an office and had invested about \$1,000 of capital, nevertheless his income was derived from the sale of Swiss embroideries. The embroideries were sold from designs or drawings shown from sample embroideries and the orders were procured by the plaintiff as a canvasser and by his personal solicitation. In that case, after reviewing the authorities, it was held in substance that where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, the income or profits from a business should not be considered in determining the amount of the damages to which the plaintiff is entitled.

The question of personal earnings is too much involved in this case with the ordinary chances of a business venture to allow the profit on the plaintiff's business to be considered in determining what damages the defendant should pay to the plaintiff.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER and WILLARD BARTLETT, JJ., concur.

Judgment reversed, etc.

WILLIAM H. TALBOT, Respondent, *v.* MAX LAUBHEIM et al., as Administrators of the Estate of SAMUEL LAUBHEIM, Deceased, et al., Appellants.

1. EVIDENCE — WHEN ADMISSIONS CONTAINED IN A COUNTERCLAIM ARE ADMISSIBLE IN EVIDENCE AGAINST THE DEFENDANTS IN AN ACTION. Upon the trial of an action for goods sold and delivered, admissions contained in a counterclaim, forming part of a verified answer, are admissible as evidence against the defendants. While such admissions are not conclusive as against a general denial also contained in the answer, they may be considered, with the other evidence received on the trial, in determining and deciding the issues in the action.

2. WITNESSES — CODE CIV. PRO. § 829 — WHEN INTEREST OF WITNESS IN RESULT OF ACTION TOO REMOTE TO DISQUALIFY HIM FROM TESTIFYING AS TO CONVERSATIONS WITH A DECEASED DEFENDANT. Where an action was brought against the members of a firm to recover for goods sold and delivered to them, and one of the defendants died after the commencement of the action, and his administrators with will annexed were substituted in his place and stead, the secretary and treasurer of an insolvent corporation whose assets were sold by the sheriff several years previous is not disqualified under the statute (Code Civ. Pro. § 829) from testifying, as a witness for plaintiff, to conversations had with the deceased member of the firm relative to the sale of the goods in question, by reason of the fact that such corporation had been an agent or factor for plaintiff's assignor in such sales, and that if plaintiff failed to recover from defendants because of any mistake or fault on the part of such corporation, the mistake or fault would be chargeable to the corporation. The interest of the witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, is too remote, uncertain and doubtful to make him interested in the event within the meaning of the statute.

*Talbot v. Laubheim*, 111 App. Div. 915, affirmed.

(Argued April 5, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 21, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

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*Louis Zinke* and *A. U. Zinke* for appellants. Talbot, Keene and Cainin were all incompetent to testify under section 829 of the Code of Civil Procedure. (*Wilcox v. Corwin*, 117 N. Y. 500; *Church v. Howard*, 79 N. Y. 415; *Holcomb v. Holcomb*, 95 N. Y. 316; *Wallace v. Strauss*, 113 N. Y. 238; *Redfield v. Redfield*, 110 N. Y. 671; *Heyne v. Duerfleter*, 124 N. Y. 505; *Leutchford v. Lord*, 132 N. Y. 465; *Matter of Lasak*, 131 N. Y. 624; *Hutton v. Smith*, 175 N. Y. 379; *Burdick v. Burdick*, 180 N. Y. 261.) The admissions in the amended answer cannot be invoked in plaintiff's favor as evidence and used to sustain a recovery. (*Cook v. Barr*, 44 N. Y. 158; *Hutchins v. Van Vechten*, 140 N. Y. 118; *Eisenlord v. Clum*, 126 N. Y. 559; *Mayor, etc., v. Fay*, 53 Hun, 553; *Mittnacht v. Bache*, 16 App. Div. 430; Code Civ. Pro. § 507; 1 Rumsey Pr. [2d ed.] 436; *Goodwin v. Wertheimer*, 99 N. Y. 149; *Bruce v. Barr*, 67 N. Y. 237; *Society v. Sulzer*, 138 N. Y. 466; *Conklin v. Woodbury Institute*, 27 App. Div. 610; *Scofield v. Whitelegge*, 49 N. Y. 259.)

*George C. Harrison* for respondent. The testimony of plaintiff's witness is competent for the purposes for which it was admitted by the trial judge. (*Wallace v. Strauss*, 113 N. Y. 238.) The record shows a *prima facie* case in favor of plaintiff. (Code Civ. Pro. § 424; *Freeman v. Young*, 63 N. Y. 176; 73 N. Y. 223; 84 N. Y. 63; *Stedeker v. Bernard*, 102 N. Y. 327; *Condee v. Smith*, 93 N. Y. 349.)

CHASE, J. This action is brought for goods sold and delivered by the plaintiff's assignor to the defendants as originally named in the action. The defendant Samuel Laubheim died after the commencement of the action, and by consent the administrators with the will annexed of said Samuel Laubheim, deceased, were substituted as defendants in his place and stead. The defendants appeared generally and interposed an answer to the plaintiff's complaint, in which they denied the material allegations thereof and also alleged

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therein certain defenses and counterclaims. On the trial the plaintiff produced evidence showing that his assignor from time to time furnished bullion for the Camm Watch Case Company, a corporation, and that said watch case company solicited orders for watch cases that it might make the same from the bullion so furnished by the plaintiff's assignor, and that the plaintiff's assignor paid for the manufacture of said cases and carried out the contracts so made by the watch case company in his name. The secretary and treasurer of said watch case company, acting for the plaintiff's assignor, agreed with said Samuel Laubheim to make seventy-five plain watch cases at a price named. The cases were subsequently made and delivered to plaintiff's assignor. Plaintiff's assignor sent the watch cases with a bill therefor to be delivered to Laubheim Brothers, in New York city. Subsequently the plaintiff, who is his assignor's general manager in the assignor's business in New York city, saw all, or nearly all, of the cases in the safe at the store of Laubheim Brothers. The plaintiff then offered in evidence from the answer of the defendants the following allegation: "That in violation of the contract or agreement under which the aforesaid cases were *sold and delivered to these defendants.*"

The remaining part of the paragraph of the answer from which the alleged admission is taken is as follows: "There was charged, and the defendants are informed and verily believe, there is included in the amount claimed in the complaint herein, the sum of \$14.77 for alleged overweight, and that, in fact, there was no overweight in the said goods; and that these defendants therefore likewise counterclaim and set off said sum of \$14.77 against any recovery that may be had by the plaintiff herein."

The parties rested, and the court directed judgment in favor of the plaintiff for the amount claimed by him less \$14.77, the amount so alleged in the answer as a counterclaim, and from the judgment entered thereupon an appeal was taken to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed (111 App. Div. 915),

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and from such judgment of affirmance the appeal is taken to this court. The defendants claim that the plaintiff failed to prove a cause of action. The evidence was fragmentary, disconnected, and not very conclusive, but we are unable to say that there is not some evidence to sustain the judgment directed by the court.

The defendants also claim that errors were committed by the trial court in its rulings.

1. In allowing admissions contained in the counterclaim to be considered as evidence on the trial of the action.

A defendant may interpose as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable (Code Civil Procedure, sec. 507), and although an objection that the defenses or counterclaims are inconsistent is not available (*Bruce v. Burr*, 67 N. Y. 237; *Societa Italiana v. Sulzer*, 138 N. Y. 468) the pleading, so far as it alleges new matter constituting a defense or counterclaim, must contain a statement in ordinary and concise language of the facts claimed by the pleader. The practice under our Code of Civil Procedure does not recognize fictions or that a verified pleading can contain anything other than a truthful statement of the pleader's contention. There is no reason, therefore, why the allegations of a verified pleading, even if not conclusive against the pleader, should not be treated as admissions against the person or persons making them, the same as if made orally, or in any document or proceeding. The admissions in a pleading must be taken in connection with all the allegations thereof, and the weight to be given to admissions which are not in themselves conclusive against the pleader is to be determined by the court or jury the same as other evidence offered on the trial. Where all of the defendants unite in an answer, the admissions therein are to be treated in the action in which the pleading is served as the admissions of each, and not confined to the person actually verifying the same. We are not unaware of the fact that there are decisions which hold that an admission in a special defense or counterclaim cannot be

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considered for the purpose of overcoming the effect of a general denial. Such an admission is not conclusive as against a general denial, but we can see no reason upon principle why such an admission should not be considered with the other evidence received on the trial in deciding and determining the issues in the action. There are many reported cases sustaining the right to consider such admissions as evidence against the person or persons making them. (*Cook v. Barr*, 44 N. Y. 156; *Young v. Katz*, 22 App. Div. 542; *McIntire v. Wiegand*, 24 Abb. [N. C.] 312; *Klein v. East River Electric Light Co.*, 90 App. Div. 92; reversed as to the effect or weight of the evidence, 182 N. Y. 27.)

2. In allowing the plaintiff's assignor to testify in regard to a conversation in the store of Laubheim Brothers, in which Samuel Laubheim, now deceased, took part. The conversation referred to related to the defendants' alleged counterclaim for overweight charged by the plaintiff in this action. As the court allowed the defendants their entire alleged counterclaim for overweight it is not necessary to consider the question as to whether the testimony of the plaintiff's assignor relating thereto should or should not have been admitted.

3. In allowing the secretary and treasurer of the Camm Watch Case Company to testify to conversations with Samuel Lanbeim, now deceased.

It is claimed by the defendants that such witness was interested in the event of the action by reason of the fact that if the plaintiff failed to recover in the action against the defendants by reason of any mistake or fault on the part of the Camm Watch Case Company, that the damage or loss to the plaintiff and his assignor by reason of such mistake or fault would be charged to said watch case company. The Camm Watch Case Company stopped business in 1901 and its assets were sold by the sheriff. The interest of the witness, if any, in that company, by reason of his being at the time its secretary and treasurer, is too remote, uncertain and doubtful to make him interested in the event within the meaning of section 829 of the Code of Civil Procedure.

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The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent. (1 Greenleaf on Evidence, section 390.)

The judgment should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and Hiscock, JJ., concur.

Judgment affirmed.

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ANDREW J. DICK, Appellant, v. SUSIE MARVIN, Respondent.

EVIDENCE — PAYMENT — WHEN EVIDENCE, TENDING TO SHOW THAT A DEFENDANT HAD SUFFICIENT MONEYS TO MAKE PAYMENTS ALLEGED, IS ADMISSIBLE TO PROVE PAYMENT. Where the plaintiff, upon the trial of an action, brought to recover a balance alleged to be due upon three promissory notes, in which the defense of payment was pleaded, endeavored to show by the cross-examination of defendant that she had not been in possession of sufficient money to pay such balance during the period in which she testified that she had paid it, the evidence of a witness that he had loaned money to defendant at different times during the period in question is competent and admissible to show that the defendant had sufficient moneys to make the payment as alleged.

*Dick v. Marvin*, 112 App. Div. 904, affirmed.

(Argued April 22, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 30, 1906, affirming a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

*N. F. Breen* for appellant. It was not proper for defendant to call witnesses to show where she got the money she claimed to have paid. (*Daby v. Ericsson*, 45 N. Y. 786; *Hilton v. Scarborough*, 5 Gray, 422.)

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*Archie C. Ryder* and *John N. Carlisle* for respondent. It was competent to show that the defendant had or procured money with which the payments might have been made. (*Dishno v. Reynolds*, 17 Hun, 137; *Ostrander v. Snyder*, 73 Hun, 378; 148 N. Y. 757; *Planter v. Planter*, 78 N. Y. 90.)

WILLARD BARTLETT, J. This action was brought to recover a balance alleged to be due upon three promissory notes. The defense was payment. The case was tried before a referee who found in favor of the defendant. The judgment entered upon his report was unanimously affirmed by the Appellate Division. The appeal to this court presents only one question which we deem it necessary to discuss.

The defendant was a witness in her own behalf and testified on her direct examination that she had paid to the plaintiff the balance due upon the promissory notes which he sought to recover in this action. Upon cross examination the learned counsel for the plaintiff endeavored to show by a long series of questions that the witness had not been in possession of sufficient money to pay her indebtedness to the plaintiff during the period when she testified that she had paid it. That such was the purpose of the portion of the cross-examination to which we refer appears beyond question by a statement of counsel to the referee in the course of that examination, where he said: "I want to show where this woman got all this money to show in the end that she did not have all the money that she said she had and, therefore, she could not pay it."

The defendant subsequently called to the stand a witness named Edwin E. Ellinwood who testified that he had loaned money to her at different times during the period in question. Counsel for the plaintiff objected to some of the questions by which this testimony was elicited on the ground that proof of the fact that witness had loaned any money to the defendant was incompetent and immaterial. The objections were overruled and exceptions were duly taken. These rulings present the question whether in an action on contract where

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the defense is payment and the plaintiff has sought to defeat that defense by proof of the defendant's inability to pay, it is competent for the defendant to introduce the evidence of other witnesses to prove the possession of sufficient moneys wherewith to make the payment.

We are not referred to any case in this court in which this precise question has been decided. Indeed, the only decision bearing on the subject cited by either party is *Dishno v. Reynolds* (17 Hun, 137); but that case is not exactly in point. There the plaintiff sought to recover a sum alleged to have been paid to the defendant in excess of the amount due him on a bond and mortgage; and the plaintiff was allowed to introduce the evidence of another person showing that prior to the execution of the bond and mortgage he had paid the plaintiff a sum of money large enough to enable him to make the alleged overpayment. The General Term in the third department (LEARNED, BOARDMAN and BOCKE, JJ.) held such evidence, although not very cogent, was admissible as tending to establish a fact which in the judgment of the jurors might aid them in arriving at the probable truth. There, it will be observed, testimony tending to establish the ability of the party to make the payment in question was adduced in the first instance by that party himself and in advance of any attempt to show upon the trial that he was not of sufficient means to make the payment which he claimed to have made. We are inclined to think that the weight of authority is against the admission of such proof under such circumstances. Thus, in an action upon a judgment it has been held that an offer to show the pecuniary ability of the defendant for many years after a recovery of judgment against him during which period he had been possessed of a large property, was properly overruled as not tending to establish a plea of payment. (*Daby v. Ericsson*, 45 N. Y. 786.) Again, in *Hilton v. Scarborough* (5 Gray, 422) the defendant to raise a presumption of payment was allowed to call a witness to prove that for several years past he had had means to pay the amount of the note in suit, but

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the Supreme Judicial Court of Massachusetts declared that the admission of this evidence was erroneous, saying: "The effect of the reputed wealth of the defendant and his supposed ability to pay whenever called upon might have furnished the very reasons bearing on the plaintiff's mind to allow the note to remain uncollected." The same court in *Atwood v. Scott* (99 Mass. 177) said: "Experience is not sufficiently unanimous to raise a presumption that one who has the means of paying a debt will actually pay it. Accordingly it is held that the fact that a debtor has had such means is not evidence to show that the debt has been paid."

The circumstances, however, under which evidence as to the defendant's possession of money was introduced in the case at bar were very different from those which existed in *Dishno v. Reynolds* (*supra*), and it is not necessary to adopt or sanction the doctrine of that case in order to sustain the rulings now under review. The fact that a party pleading payment was not possessed of means to pay is competent evidence tending to disprove payment (*Atwood v. Scott, supra*), and where such evidence has been given by the party controverting the plea of payment or where by cross-examination he has sought to establish the inability of the adverse party to pay, it then becomes permissible for the party who has set up the payment to sustain that defense by direct proof to the effect that he possessed the requisite means.

The rule applicable in such cases is well stated by Professor Wigmore in his elaborate work on the law of evidence in these words: "The possession of means will usually not be admissible as making probable the payment or loaning of money. Where the lack of money is alleged as showing probable non-payment this lack may be denied by evidence to the contrary, *i. e.*, by proving possession." (1 Wigmore on Evidence, § 89, page 166.) This was held to be the correct rule by our Supreme Court in the case of *Phillips v. Lewis* (12 App. Div. 460) where there was a plea of payment and the plaintiff had given evidence tending to show that the defendant was without means to make some of the payments which

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the defendant testified that she had made. In view of such proof it was declared that the defendant might show by any competent evidence that she possessed the necessary means. The admissibility of such testimony where a question has been raised as to the pecuniary ability of the party pleading payment is clearly supported by every consideration of fairness and justice and appears to have the sanction of judicial authority wherever the question has been raised. The citation of two cases will suffice to illustrate the view which has been taken by the courts. In *Wiggin v. Plumer* (31 N. H. 251, 269) evidence had been introduced the effect of which was to show the general want of ability of the plaintiff to make a certain loan which was in controversy, and the court held that this rendered it proper to receive rebutting proof tending to show that his actual means were considerable. "No fact can in the first instance be offered in evidence unless it is material to the issue," said the court, "but evidence being introduced to prove such fact any evidence tending to disprove it thereby becomes material and admissible whether or not it would be received if offered as direct proof of the issue in the case." In *Higgins v. Andrews* (121 Mass. 293) evidence was admitted to show that the plaintiff had money which he might have loaned to the defendants, and the court in overruling an exception to its admission said: "If the defendants denied that the plaintiffs had such money this evidence was competent." The rulings of the referee in the case at bar were in accordance with judicial authority and sound reason; the plaintiff's exceptions, therefore, afford no ground for interfering with the judgment.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, FAIGHT,  
WERNER and HISCOCK, JJ., concur.

Judgment affirmed.

**MAX MARX, Appellant, v. CHARLES BROGAN, Respondent.**

**1. SUBMISSION OF A CONTROVERSY — CODE OF CIV. PRO. § 1279 — JURISDICTION OF COURTS.** Where a controversy, submitted upon an agreed statement of facts under section 1279 of the Code of Civil Procedure, presents a pure question of law, the Supreme Court has power to decide it, and the Court of Appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the Supreme Court is without jurisdiction, and a judgment entered upon such a decision must be reversed and the proceeding dismissed.

**2. REAL PROPERTY — QUESTION OF FACT CANNOT BE DETERMINED IN A SUBMITTED CONTROVERSY.** Where the facts stated in a controversy submitted to determine whether a building about to be erected is of such a character that its erection will constitute a violation of a covenant, designed to prevent the erection of a tenement house upon lands owned by the parties to the proceeding, are merely descriptive and purely evidentiary in their nature, so that, before a court can determine whether the proposed building would be in contravention of the terms of the covenant, it must first be decided whether the building as thus described is an apartment house within the legal definition of that term, the fundamental question involved is not a question of law, but essentially a question of fact which should be adjudicated in an action. The Supreme Court has no jurisdiction, therefore, to decide the question, and a judgment entered upon its decision of the controversy must be reversed and the proceeding dismissed, without prejudice to an action.

*Marx v. Brogan*, 111 App. Div. 480, reversed.

(Argued April 18, 1907; decided May 21, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 22, 1906, in favor of defendant, upon the submission of a controversy under section 1279 of the Code of Civil Procedure.

The nature of the controversy and the facts, so far as material, are stated in the opinion.

*Charles Straus* for appellant.

*Henry W. Hayden* and *Albert J. Shaw* for respondent.

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WERNER, J. This appeal comes to this court from a judgment entered upon a decision of the Appellate Division rendered after the hearing of a submitted controversy under section 1279, Code of Civil Procedure. The question decided by that court, which we are asked to review, is whether a building which the defendant proposes to build upon a parcel of land owned by him and located in 148th street, New York city, is of such a character that its erection will constitute a violation of a covenant designed to prevent the erection of a tenement house upon lands owned by the respective parties. The fate of this appeal depends wholly upon the nature of the issue embraced in the controversy submitted to the learned Appellate Division. If the submitted case presented a pure question of law, the Supreme Court had power to decide it and we are charged with the duty of reviewing the correctness of that decision; but if the question of law could not be decided without first disposing of conflicting or equivocal inferences of fact, the court below was without jurisdiction, the judgment herein must be reversed and the proceeding dismissed.

The submission of controversies for judicial decision without litigation is of statutory birth. It seems to have had its origin in this state in the report of the commissioners appointed to revise our practice and procedure under the Constitution of 1846. That report contained a section which the legislature adopted as part of the Code of Procedure of 1848 in which it was first designated as section 325, and later as section 372. It is now section 1279 of the Code of Civil Procedure.

The portion of the present section which is material to the controversy at bar is substantially identical with the original enactment. It provides that, "The parties to a question in difference, which might be the subject of an action, being of full age, may agree upon a case, containing a statement of the facts; upon which the controversy depends; and may present a written submission thereof to a court of record, which would have jurisdiction of an action, brought for the same

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cause." In reporting the original section as one of the amendments to our procedure the commissioners said : "This provision, it is believed, will be useful in many cases where a question as to a legal right exists between fair and honorable men, there being no dispute about the facts."

The language of the statute, supplemented by the sentence quoted from the report of the commissioners, leaves no doubt as to the nature and scope of the proceeding described in the statute. It was not intended to embrace issues where any dispute of fact was involved, but was to be confined to causes depending wholly upon questions of law. That is the plain and unmistakable import of the words used in the statute. That was clearly the understanding of the commissioners who reported this amendment to our law of procedure, and that has been the view entertained by our courts since it has been a part of the two Codes referred to. (*Neilson v. Com. Mut. Ins. Co.*, 3 Duer, 455; *Clark v. Wise*, 46 N. Y. 612; *Fearing v. Irwin*, 55 id. 486.) It seems obvious, therefore, that whenever it clearly appears that a submitted controversy necessarily involves the duty of drawing inferences from inconclusive, equivocal or evidentiary facts before a legal conclusion can be formed, it follows as a logical sequence that the issue is one which must be presented and decided in an action, and not in this statutory proceeding. This view is strongly reinforced by the decisions of other states where our statute has served as a model. While it cannot be said that these foreign decisions are absolutely uniform as to the jurisdictional powers of the courts in such proceedings, it may safely be affirmed that under statutes like ours there has been no substantial deviation from the view that the courts have no power to draw inferences of fact as distinguished from inferences of law. (*Goodrich v. City of Detroit*, 12 Mich. 279; *Powers v. Provident Institute for Savings*, 122 Mass. 443; *Pray v. Burbank*, 11 N. H. 290; *Burr v. Des Moines R. R. & N. Co.*, 1 Wall. 99, 102; 1 Ency. Pl. & Pr. 393; *Mayhew v. Durfee*, 138 Mass. 584; *Hysinger v. Baltzell*, 3 Gill & J. 159; *Vansant v. Roberts*, 3 Md. 119; *Sawyer v. Corse*, 17 Gratt. [Va.]

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230.) In Massachusetts and Maryland, under statutes which in their essential features are identical with our own, and in cases directly involving the question, the courts have laid down what we regard as the correct rule. In *Mayhew v. Durfee* (*supra*) the Supreme Judicial Court of Massachusetts states it as follows: "When an action at law is submitted upon agreed facts either to the Superior Court or to this court, only questions of law are submitted, and neither court can draw inferences of fact from the facts agreed, unless, as matter of law, they are necessary inferences." In Maryland, in the case of *Hysinger v. Baltzall* (*supra*), the rule is stated to be that the court can "make no inferences unless they be of law or are such as are clear, undeniable deductions from the statements agreed on. It is competent for the jury to draw inferences from testimony submitted to them, but that power is not extended to the court when required to act on a case stated where nothing can be supplied by implication."

In the light of the history of our statute and the decisions which bear upon its scope and meaning, a short review of the facts submitted in the controversy at bar will disclose that they are not of such a conclusive character as to obviate or exclude the necessity of drawing inferences of fact essential to a complete determination of the controversy. On the contrary, the facts submitted are purely evidentiary in their nature, leaving the essential, decisive or ultimate fact to be decided by the court. As will be seen by reference to the record, the facts agreed upon are merely descriptive. They disclose the dimensions of the building which the defendant desires to erect; its external appearance; its internal arrangements; the materials of which it is to be composed, and the estimated cost of the whole, with the rentals expected to be realized. Before a court can determine whether the proposed building would be in contravention of the terms of the covenant against the erection of a tenement house, it must first be decided whether this building as thus described is an apartment house within the definition of that term recently approved by this court in *Kitching v. Brown* (180 N. Y.

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414). It needs no argument to show that there may be cases in which the description of a building proposed to be erected so clearly fixes and discloses its real character that its status can be decided as a matter of law. On the other hand, it is equally plain that there may be other cases in which a description, although involving no dispute of the evidentiary facts submitted may give rise to conflicting or equivocal inferences as to other facts which must be decided before the real character of the structure can be determined. The case at bar affords a fair illustration of the latter class. The drawing which shows the facade of the building; the plans setting forth its internal arrangement; the description of the materials of which it is to be constructed; the statement of the estimated cost of the whole, and of the rents expected to be derived therefrom, are all calculated to raise the question whether this building is to be a cheap apartment house or a superior tenement house. The decision of this question depends upon a practical knowledge of the present housing conditions in New York city and of the essential differences which distinguish one class of structures from another. This question cannot be decided merely by reference to the name which the intending builder gives the proposed structure, but must be determined in view of its real character as disclosed by its cost, the precise character of its construction, the quality of the materials used, its location, the scale of rentals to be charged and the class of tenants by whom it is to be occupied. If, in a doubtful case, these elements can be determined as questions of law, then the mere arbitrary characterization by the courts of a described structure may place it in one category or the other without regard to its real character and in disregard of the relation which it may bear to well-defined classes of buildings or to the locality in which it is placed. The mere statement of the proposition seems to us sufficient to indicate that what is fundamentally involved in this case is not a question of law at all, but essentially a question of fact.

It is suggested that this decision will tend to discourage the laudable efforts of disputants to submit their differences for

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decision without the expense and delay incident to litigation. We do not think so. It is farthest from our intention or desire to impair in the slightest degree the usefulness of this summary manner of settling legal disputes. It seems thus far to have afforded to parties an inexpensive and expeditious method of securing the judgments of the courts without the delay and circumstance inseparable from regular actions and has amply vindicated the wisdom of the commissioners upon whose report it was inaugurated. We are promulgating no new rule of law as to this proceeding, but are simply following the authorities which define its scope and its limitations as clearly indicated in the statute. When the ultimate as well as the evidentiary facts upon which a legal conclusion depends are all agreed upon and properly submitted, a case falls within the purview of section 1279 of the Code of Civil Procedure. But when the facts agreed upon and submitted give rise to other inferences of fact which may be conflicting; then resort must be had to an action for the adjudication of the matter in difference.

We think there is nothing in the foregoing views which conflicts with our decision in *Kitching v. Brown* (180 N. Y. 414). That was an action tried before the court without a jury and all questions of fact were disposed of before it reached the Appellate Division. The effect of the decision of the trial court in that case was to determine that the building over which the controversy arose was an apartment house, and not a tenement house. As there was evidence to sustain the finding of fact there made, its affirmance by the Appellate Division, although by a divided court, settled that question in this court. The legal question which this court decided in that case was that a covenant against the erection of a tenement house was not intended to prohibit the building of an apartment house as that designation is now defined and understood.

The judgment appealed from should be reversed and the proceeding dismissed, without prejudice to any action, without costs to either party.

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N. Y. Rep.] Dissenting opinion, per HAIGHT, J.

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HAIGHT, J. (dissenting). I am unable to concur in the conclusion reached by my associates. To my mind it seriously impairs one of the most valuable remedies given by the Code, that of permitting parties to submit their controversies upon facts agreed upon. If the facts in this case are not such as can be submitted to the court for its determination of the rights of the parties, I apprehend that the legal profession in the future will find it difficult to determine the facts and cases that may be submitted.

The rule, as I understand it, is that the facts agreed upon should be such that conflicting inferences of fact may not be drawn therefrom, and that they should be sufficiently or so fully stated as to enable the court to award judgment thereon.

The defendant is the owner of a tract of land on One Hundred and Forty-eighth street in the city of New York, upon which there is a covenant against the erection of a tenement house. He has planned to erect thereon a building which he claims to be an apartment house. The plaintiff seeks to enjoin him from the construction of the building, upon the ground that the building would be a tenement house, and, therefore, prohibited by the covenant. The only question, therefore, in controversy is as to whether the proposed structure would constitute a tenement or an apartment house. For the purpose of having this controversy determined, they have agreed upon all of the facts pertaining to the proposed structure, together with the character of the buildings existing upon that block and of the surrounding territory. The building is to be one hundred feet in width at its front on 148th street, eighty-seven feet in width in the rear, and eighty-one feet in depth. It is to be six stories high, constructed of brick and stone, with tile floors for the main hall, marble wainscoting, divided into apartments which contain a private hall, parlor, dining room, kitchen, bedroom, servants' room, private bathroom and closet; each apartment to be finished with hard wood, heated by steam, equipped for lighting by electricity and gas, provided with hot and cold water, open-work plumbing, gas ranges for cooking, a dumbwaiter and a

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long distance telephone. The building is to have an electric elevator, is to cost one hundred and twenty-five thousand dollars, and the apartments are expected to rent for about eleven dollars per room per month, making from fifty-five to sixty-six dollars per month for an apartment; detailed plans of the proposed building are given, and also an architect's picture of the front elevation as the building will appear when completed. Other details of the work are embraced in the statement of facts which need not now be stated. It is not suggested that any essential fact has been omitted from the agreement, or that could be proved upon a trial that would further aid the court in determining the question upon which the parties differ. It is contended, however, that all of the facts submitted are purely evidentiary in their nature, leaving the essential, decisive or ultimate fact as to whether the structure would constitute a tenement or an apartment house undisposed of. If they had been able to agree upon that question, there would have been no controversy to submit to the court. If a person goes to a grocery store and buys a quantity of tea for two dollars, sugar for three dollars, and flour for five dollars, I presume the three purchases would be evidentiary facts upon the question as to the amount that would be owing the groceryman. But with the items of the three purchases agreed upon, I apprehend no court would hesitate about ordering judgment for the amount due.

In the case of *Kitching v. Brown* (180 N. Y. 414) we have recently defined tenement houses and apartment houses, showing the distinction between the two classes of structures. The question at issue between the parties has to be determined from the character of the proposed structure, the material used, its cost, appearance, its appointments and uses, all of which are covered by the facts agreed upon and from which the court is asked to determine from those facts whether the proposed structure is brought within the definition constituting that of an apartment or a tenement house. This, I think, is a conclusion of law drawn from the facts agreed upon. Suppose the plaintiff had brought an action to enjoin the

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defendant from constructing the building, and in his complaint had set forth the identical facts agreed upon from which he claimed that the structure would constitute a tenement house, and that the defendant had demurred thereto, contending that upon the facts stated the structure would be an apartment house and that, therefore, the complaint did not state a cause of action. Could it then be contended that a question of law would not be presented for the determination of the court? Again, suppose the action had been brought to trial, and thereupon, by stipulation of the parties, the facts as here agreed upon had been read as the evidence in the case, would there have been any question to submit to the jury? I think not.

It is further contended that the facts agreed upon are not only merely evidentiary, but that they are also such that conflicting inferences of fact may be drawn therefrom. If so, my associates are correct in the conclusion which they have reached. But what conflicting inference is there that can be drawn from these facts? My attention has been called to none. Stone is stone, marble marble, and brick brick. I am not aware that any conflicting inference can be drawn from the fact that the building is to be constructed out of these materials, nor am I able to discover any of the other facts stated which are open to change or modification by inferences of fact which may be drawn therefrom. This is not a case involving the intent of a person which may only be determined from inferences drawn from his acts, conduct and expression. It is a case in which the submission consists of the facts stated, which mean what they state and nothing more, which to my mind are not subject to change by conflicting inferences.

I, therefore, am of the opinion that the question submitted ought to be determined upon its merits.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT and HISCOCK, JJ., concur with WERNER, J.; HAIGHT, J., reads dissenting opinion.

Judgment reversed, etc.

## Statement of case.

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**THE PEOPLE OF THE STATE OF NEW YORK ex rel. GUSTAVUS  
A. DURYEE, Appellant, v. EMMA G. DURYEE, Respondent.**

**APPEAL — INCIDENTAL ORDER IN HABEAS CORPUS PROCEEDING NOT REVIEWABLE BY APPELLATE DIVISION.** An order in a habeas corpus proceeding which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable, under section 2058 of the Code of Civil Procedure, since it is not a final order; and an order of the Appellate Division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding and is, therefore, reviewable by the Court of Appeals.

*People ex rel. Duryee v. Duryee*, 109 App. Div. 538, reversed.

(Argued April 1, 1907; decided May 21, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 30, 1906, which reversed an order of Special Term denying a motion to dismiss a writ of habeas corpus and granted such motion.

This proceeding is a controversy between husband and wife, living in a state of separation, involving the custody of their infant daughter. It was commenced by the husband, a resident of this state, upon whose petition a writ of habeas corpus was issued against the wife. Neither the petition nor the writ is set forth in the record and the first information furnished by the parties is an order made at Special Term on the 25th of May, 1905, of which the following is a copy:

“A writ of habeas corpus directed to the above-named defendant, having been duly granted herein, requiring her to have the body of Agnes G. Duryee before this court on the first day of May, 1905; and said defendant having appeared on that day by Robertson Honey, Esq., her attorney, and having then filed a return to said writ under her oath, together with said writ, and this proceeding having thereupon been duly adjourned to the 2d day of May, 1905, for the purpose of allowing said relator to prepare a traverse to said return; and a traverse under oath of said relator having been

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duly filed by him on said 2d day of May, 1905; and said defendant having failed to produce said Agnes G. Duryee in Court, as directed in said writ, and having moved upon said return and said traverse to dismiss the writ, on the ground that said Agnes G. Duryee was without the State of New York at the time the said writ was served on said defendant and thereafter, and the Court having heard Robertson Honey, Esq., of counsel for said defendant, in support of said motion, and Walter I. McCoy, Esq., of counsel for said relator, in opposition thereto, and due deliberation being had, it is hereby

“Ordered, that said motion to dismiss said writ be and the same is hereby denied; and it is hereby further

“Ordered, that said defendant Emma G. Duryee have the body of said Agnes G. Duryee before the Supreme Court of the State of New York, at a Special Term, Part II thereof, to be held at the County Court House, County of New York, on the 25th day of September, 1905, at 10:30 o'clock in the forenoon of that day; and it is hereby further

“Ordered, that if said Emma G. Duryee shall fail to have the body of said Agnes G. Duryee in Court, as above directed, a warrant may issue for the commitment of said Emma G. Duryee without further notice, on proof by affidavit of such disobedience.”

The respondent alleged in her return that when the writ was served, Agnes, the infant whose custody is in question, “was and still is in the convent of the Sacred Heart, at Naples, Italy.” She further alleged that three children were born of her marriage to the relator, Charles, aged thirteen, Marie, aged twelve, and Agnes, aged eleven; that about seven years ago she was driven from the house of the relator by his cruelty and by his failure to contribute to the support of herself or the children; that thereupon she removed with them to the state of Rhode Island where they all now reside; that on the 4th of June, 1900, she procured an interlocutory decree of divorce from the defendant in the Supreme Court of that state and that such decree became final on the 4th of December, 1900; that soon after the date last named she and her

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children removed to Naples, where the two daughters now are; that in February, 1905, her mother died within the state of New York and it became necessary for her to come here to settle up the estate and when she came she brought her son Charles with her, intending to return to her temporary home in Naples as soon as possible; that owing to the tender years of her daughters she removed them from her temporary home and placed them in said convent for better care and protection during her absence; that at no time during the past seven years has the relator contributed toward the support of herself and children and she selected Naples as her temporary home because many of her friends were living there, her income had more purchasing power there and she could educate her children there in the French and Italian languages; that when the writ was served on her in April, 1905, it was physically impossible for her to go back for Agnes and she was unwilling to intrust her to the care of any other person to make the long journey; that it was also legally impossible for her, because on the 17th of April, 1905, she was ordered by the Supreme Court not to leave the state of New York and that the only restraint or custody exercised by her over the said infant is such as is usually exercised by a mother over her young child.

The relator in traversing the return alleged that the respondent is a resident of the state of New York; that she separated from him without just cause, and that the decree of divorce obtained in the state of Rhode Island is not binding upon him, because he did not appear in the action and no process was served upon him within the jurisdiction of the court which made the purported judgment.

He further alleged that the respondent went to Rhode Island in bad faith, in order to avoid the service of process upon her in this state; that she did not intend to acquire, and did not in fact acquire an actual "residence or domicile there;" that she has never resided there since she procured the alleged divorce; that in taking the children out of this state she violated her written agreement with the relator to allow him

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to see his children at certain times and on certain conditions; that he requested her in writing to be permitted to see his children in Naples, but that she made no response to such request.

He denied the allegations of the return relating to cruel treatment, but admitted that he had not, during the past seven years, paid anything toward the support of the respondent or the children. He alleged, however, that during the forepart of said period he was unable to do so and that during the latter part, when his finances had improved, he had offered to help support the children, provided his rights as their father were acknowledged by the respondent. He denied, on information and belief, "that when said defendant went to Naples she had many friends living there," and alleged "that her income is amply sufficient to suitably provide for said children in the State of New York \* \* \* and that if he is granted his rights in regard to said children, he is willing to contribute to their support to the full extent of his means, and that if they are given into his custody he is able and willing to support them entirely."

The allegations of the return that Agnes was in Naples when the writ was served are not effectively denied.

Upon appeal to the Appellate Division the order of the Special Term was reversed and the motion to dismiss the writ was granted.

*Walter J. McCoy* for appellant. The order is appealable to this court. (Code Civ. Pro. § 1997; *People v. Carter*, 48 Hun, 55; *Wetmore v. Wetmore*, 162 N. Y. 503; *Matter of King*, 168 N. Y. 53; *Matter of Fitzsimons*, 174 N. Y. 15.) The Appellate Division had no authority to entertain the appeal, nor to determine whether the justice at Special Term was authorized to make the order. (Code Civ. Pro. § 2058; *Matter of Larson*, 96 N. Y. 381; *Matter of Husted*, 17 Abb. Pr. 326; *People ex rel. Keator v. Moss*, 6 App. Div. 414; *Bryant v. Thompson*, 128 N. Y. 426; *Bailey v. Kincaid*, 11 N. Y. Supp. 294; *People v. Rutherford*, 47 App. Div. 209; *Rees v. N. Y. H. Co.*, 112 App. Div. 456.)

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*William McArthur and J. Campbell Thompson* for respondent.

VANN, J. The power of the Appellate Division to reverse the order of the Special Term is challenged by the appellant and section 2058 of the Code of Civil Procedure is cited in support of the challenge. That section provides when appeals may be taken in cases arising under the article relating to the writ of habeas corpus issued to inquire into the cause of detention. (Code Civ. Pro. ch. 16, tit. 2, art. 3.) It authorizes an appeal "from an order refusing to grant a writ of habeas corpus \* \* \*" or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. \* \* \* An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except" as thus prescribed. The appellant claims that the appeal to the Appellate Division was not taken from an order "to dismiss the proceedings," but from an order refusing to dismiss, from which, as he insists, no appeal is allowed by the statute, and to sustain his position he cites *Matter of Larson* (31 Hun, 539; 96 N. Y. 381). The appeal in that case, however, was from an order directing a further return to the writ, not from an order refusing to dismiss the writ. After quoting section 2058, the court said: "This is not an appeal from an order refusing to grant either of the writs named, nor is it from a final order made upon the return of such writs as provided. It is very manifest that the order from which the appeal is taken is not embraced within the provisions of the section cited. The order in question only required a further return to the writs, and upon such an order no appeal lies and the General Term had no authority to entertain the appeal, or to determine whether the judge was authorized to make the order." While the case is suggestive, it is not controlling, for the order then in question was neither final nor in any other respect such as the statute says may be reviewed.

We think, however, that the appeal to the Appellate Divi-

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sion in the case before us was not authorized by law, because the order made at Special Term was not a final order, and that the order be final is expressly required by the statute as a condition of appealing. It did not determine or end the proceeding, but continued it in force, leaving it to be ended by an order to be subsequently made. If the motion had been granted and the proceeding dismissed, the order would have been final, because the matter would have been out of court and no further order could have been made therein. If the order had been complied with, evidence taken, the material issues decided and an order then made dismissing the proceeding, it would necessarily have been final. If such an order would be final, the one made at Special Term was not, for there cannot be two final orders in the same proceeding, both made by the same court and in force at the same time. This construction is in accordance with the section of the Revised Statutes, which is the prototype of section 2058 of the Code, and which provided that no review should be had in habeas corpus proceedings "until a final adjudication shall have been made by such officer upon the claim to be discharged or bailed." (3 R. S. [6th ed.] p. 282, sec. 85.) Under that section it was held that there must be a final adjudication as to the custody of the child before a writ of review could be issued. (*Husted's Case*, 17 Abb. Pr. 326.) So, the Appellate Division of the first department held in a case decided before that now under review that "the law has expressly taken away the right to appeal from incidental orders \* \* \* in these proceedings." (*People ex rel. Keator v. Moss*, 6 App. Div. 414, 419.)

The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. It tolerates no delay except of necessity, and is hindered by no obstacle except the limits set by the law of its creation. Hence the legislature commanded that no appeal should be taken from

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incidental orders made in the course of the proceeding, as that might cause delay and prolong the injustice. Even the evil of a wrong order, if not vital, was preferred to the danger of delay caused by an appeal therefrom. This, we think, was the theory of the statute, when, contrary to the rule in other cases, it limited appeals in such proceedings to final orders, even when taken to the Supreme Court. When the writ is refused, an appeal is allowed, for that is vital. In either alternative of the remand or discharge of the prisoner, the right to appeal is given, as well as when the proceedings are dismissed. All these are both final and vital, but all else was regarded as temporary and incidental and not to be remedied by an appeal which might postpone the enjoyment of liberty.

The order of the Appellate Division was final, because it dismissed the proceeding, and hence we have power to review their order although they had no power to review the order of the Special Term, as it was not final.

In view of the latitude to be implied from the Domestic Relations Law in cases of habeas corpus affecting the custody of children (§ 40), we should have been better satisfied if the action of the Special Term had been less rigorous. The welfare of the child is the chief end in view and under the circumstances her actual production, involving one ocean voyage if not two, would have been a serious hardship to the child herself. A suitable guardian or custodian would have been necessary, yet no provision was made for expenses of any kind. As the proceeding must go before the Special Term again for suitable action, we venture to suggest, although we cannot now so decide, that the facts should be investigated somewhat before another order of the kind is made. As the matter now stands, however, we are compelled to reinstate the order of the Special Term, as the Appellate Division had no power to review or reverse it.

The order appealed from should be reversed, but without costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, HISCOCK and CHASE, JJ., concur; O'BRIEN, J., not voting.

Order reversed.

RASTUS S. RANSOM et al., Respondents, *v.* ROBERT L. CUTTING, Appellant, and THE FARMERS' LOAN AND TRUST COMPANY, Respondent.

**1. APPEAL — WRITTEN CONTRACT NOT FOUND CANNOT BE READ INTO THE FINDINGS, ALTHOUGH STATED IN THE PLEADINGS AND SET FORTH IN THE RECORD.** Where the findings, in an action to establish the rights and lien of a firm of attorneys in and to a fund recovered in a legal proceeding, under a written agreement of retainer, do not contain the agreement *in extenso* but only the substance thereof, omitting one important clause, such clause cannot be read into the findings by reason of the fact that the entire agreement is a part of the pleadings constantly referred to in the progress of the case through the courts and is printed in full at least three times in the record.

**2. ATTORNEY AND CLIENT — WHEN AGREEMENT TO CONTEST WILL AND PAY DISBURSEMENTS FOR A CONTINGENT FEE, NOT UNCONSCIONABLE.** The mere fact that the attorney was to receive a certain portion of the recovery, does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain an improper or undue advantage.

**3. WHEN AGREEMENT IS NOT CHAMPERTOUS.** Where a disinherited son voluntarily and at his own instance entered into a written agreement retaining attorneys to oppose the probate of his father's will or to effect a settlement, agreeing to pay them specified percentages in either case, the mere fact that the agreement provided that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," does not render it champertous within the meaning of section 74 of the Code of Civil Procedure; the purpose of this section is to prevent an attorney from encouraging, instigating or promoting ill-feeling or strife, and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon.

*Ransom v. Cutting*, 112 App. Div. 150, affirmed.

(Argued April 23, 1907; decided May 21, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 10, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action brought to establish plaintiffs' rights and liens as attorneys under an assignment upon certain funds in the hands of the defendant trust company on the settlement of a contest

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in the Surrogate's Court over the will of the late Robert L. Cutting, father of the defendant, Robert L. Cutting.

The facts, so far as material, are stated in the opinion.

*Franklin Bartlett* for appellant. The agreement between plaintiffs and defendant Cutting is champertous and, therefore, void and cannot be enforced. (Weeks on Attorneys [2d ed.], 186; *Irwin v. Currie*, 171 N. Y. 409; *Matter of Speranza*, 186 N. Y. 280; *Stedwell v. Hartman*, 74 App. Div. 126; *Begly v. Weddigen*, 86 App. Div. 629; *Matter of Fitzsimons*, 174 N. Y. 15.) The gist of chaimperty is not the seeking out or solicitation of the client, but, as set out in section 74 of the Code of Civil Procedure, it is the promising or giving of a valuable consideration by an attorney as an inducement to the placing in his hands of a demand of any kind. (*Matter of Clark*, 184 N. Y. 222.) Sections 73 and 74 of the Code of Civil Procedure are declaratory of the common law prohibiting chaimperty and are not merely penal statutes, so that they must be liberally construed according to their fair meaning and intendment. They cover special proceedings as well as actions. (*Spencer v. Myers*, 150 N. Y. 269; *People v. Palmer*, 109 N. Y. 110; *Fitzgerald v. Quann*, 109 N. Y. 441; *Sickles v. Sharp*, 13 Johns. 497; *Matter of Sugden v. Partridge*, 174 N. Y. 87; *People ex rel. Woods v. Lacombe*, 99 N. Y. 43.)

*William H. Hamilton* for respondents. The claim of chaimperty has not been sustained. (*Moses v. McDevitt*, 88 N. Y. 62; *Vande Water v. Gear*, 21 App. Div. 203; *Matter of Fitzsimons*, 174 N. Y. 15; *Fowler v. Callan*, 102 N. Y. 395.)

**EDWARD T. BARTLETT, J.** The opinions of the learned courts below have dealt with this case in a very satisfactory manner, and we would not be disposed to continue the discussion were it not for the fact that a question of practice is presented requiring consideration.

The written agreement of retainer between the plaintiffs and the defendant, Robert L. Cutting, and wife, is not incor-

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porated, *in extenso*, in the findings of the trial court. The substance of this agreement is found with at least one important exception. The provision that the plaintiffs "shall not call upon said Robert L. Cutting (third) for any sum or sums of money to pay the necessary disbursements required in the said proceedings" is not expressly found.

The counsel for plaintiffs, respondents, insists that the facts as found are the sole basis for appellant's discussion here. The counsel for appellant Cutting argues that the agreement must be deemed as found in its entirety by reason of the fact that it is a part of the pleadings constantly referred to in the progress of the case through the courts and is printed in full at least three times in the record.

This omitted clause of the agreement and any other provision thereof not expressly found cannot be read into the findings as they stand.

The learned counsel for appellant bases his main argument upon the fact that the plaintiffs were not to call upon the defendant Cutting for any sum or sums of money to pay the necessary disbursements required in the said proceedings. If the respondents were in a position where it was necessary to insist upon the strict construction of the findings there would be no answer to the point they have raised that this important omitted clause is not before us.

On the argument and in the brief of respondents' counsel it was suggested that this court look carefully through the record, notwithstanding the unanimous decision of the Appellate Division, to ascertain the real merits of the controversy. We have, therefore, concluded in rendering our decision in favor of the respondents to consider the omitted clause, giving it the full force and effect as if embodied in the findings.

It is not necessary at this time to consider in detail the findings of the trial court and the conclusions flowing therefrom, for this point has been so thoroughly discussed in the opinions of the courts below that it would be mere repetition.

Two main points are argued in support of this appeal: (1) That the agreement of retainer is unconscionable and ought

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not to be enforced in a court of equity ; and (2) that the agreement is champertous under section 74 of the Code of Civil Procedure. In regard to the contract being unconscionable and non-enforceable it is a sufficient answer to say that this question is disposed of in favor of the respondents by the unanimous decision of the Appellate Division. There is, however, a further answer to the suggestion in the rule recently restated by this court in *Matter of Fitzsimons* (174 N. Y. 15) as follows : The mere fact that the attorney was to receive one-half of the recovery does not render the agreement unconscionable in the absence of proof that it was induced by fraud or that the compensation provided for was so excessive as to evince a purpose to obtain an improper or undue advantage.

This appeal is presented upon the plaintiffs' case, the defendant Cutting having offered no evidence.

The counsel for appellant argued with great earnestness and ability that this agreement of retainer is in violation of section 74 of the Code of Civil Procedure and is champertous. The material portion of that section reads as follows : " An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon."

There is no finding and no evidence in this case tending to establish any fact that would bring the plaintiffs by virtue of the agreement of retainer within the provisions of this section. It is found in substance that the plaintiffs were and are engaged in the practice of the law in the city of New York, and that Rastus S. Ransom was a member of that firm during the transactions involved in this action ; that Robert L. Cutting, the father of the defendant, Robert L. Cutting, departed this life on the 13th of January, 1894, leaving a large estate, a will and certain codicils ; that said deceased was vested also with a power of appointment by will in respect to a half of

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his father's estate, the defendant's grandfather, which he assumed to exercise; that the defendant Cutting was disinherited by his father from any participation in his estate or that of his grandfather; that shortly after the death of his father the defendant Cutting by a written instrument dated February 1st, 1894, duly retained and employed the plaintiffs and their law firm to act as his attorneys and counsel to make objections to and in contesting the probate of the will and codicils of his father. The evidence fully sustains these findings and establishes the fact that the plaintiffs were voluntarily retained by the defendant Cutting.

This agreement of retainer must be regarded as a contract for the compensation of the plaintiffs who were retained to appear for a disinherited son whose only hope was to contest the probate of his father's will and codicils, thereby setting aside those instruments, or failing in that, to secure a settlement that would permit him to receive some portion of his father's estate. This latter result was realized, the defendant Cutting receiving thirty thousand dollars in cash and an annuity of four thousand dollars to continue during his natural life. This annuity was secured to him by the deposit of ninety-five thousand dollars in the defendant trust company. The agreement of retainer provided that the plaintiffs were to receive ten per cent of the moneys realized on a settlement if less than fifty thousand dollars. On the payment to the defendant Cutting of the sum of thirty thousand dollars, he at once paid the plaintiffs ten per cent thereof—three thousand dollars—and for some eight years he paid the ten per cent on his annuity.

We have here a ratification of the agreement of retainer, of the results achieved thereunder and a repudiation after years of acquiescence. It is clear under this state of facts that section 74 of the Code of Civil Procedure had no application.

The counsel for defendant Cutting seeks to bring this agreement of retainer under the condemnation of the section in question by the argument that the provision therein, to the effect that the plaintiffs would not call upon the defendant

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Cutting "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," is the giving of a valuable consideration to the defendant Cutting as an inducement to enter into the contract. In other words, the counsel likens the case at bar to many that have been argued in this court, where it was decided that a lawyer, agreeing with his client to bring an action and pay all the expenses thereof in consideration of receiving a portion of the recovery, violates the section in question.

The purpose of section 74 of the Code of Civil Procedure is to prevent an attorney from encouraging, instigating or promoting ill-feeling and strife, and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon.

The contract before us providing for compensation of plaintiffs in defending the defendant in a hostile proceeding about to be instituted in Surrogate's Court, brings this case within the rule laid down in *Fowler v. Callan* (102 N. Y. 395). In that case proceedings had been instituted before a surrogate which threatened the interests of the defendant in certain real estate and required him to appear and defend. He called upon the plaintiff and retained him as his attorney. They entered into an agreement, in pursuance of which the defendant executed to plaintiff a deed of an undivided half of the real estate, the latter agreeing to accept the same as his compensation to conduct the defense to its close, and pay all the costs and expenses of the litigation, and to indemnify the defendant against the same. Judge FINCH, in his opinion, after commenting upon the serious position in which the defendant found himself, stated (p. 398): "In this emergency he sought the aid and professional services of the plaintiff and retained him as attorney. The latter neither sought the retainer nor did anything to induce it. So far as appears it was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised or was out of possession, but he gave

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to the attorney a deed of one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability. The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for the precise purpose. The contract in no respect induced the litigation."

This case is a complete answer to the argument of appellant's counsel that the agreement of plaintiffs not to call upon the defendant, Cutting, for money to pay the necessary disbursements, rendered the agreement of retainer champertous.

We are of opinion that the attorneys for the defendant, Cutting, acted in every way as honorable practitioners, and are subject to no criticism for the manner in which they conducted the case of their client; they rendered to him, as the court found, extensive, valuable and meritorious legal services, and secured for their client a favorable result under conditions that were, to say the least, most unpromising.

The judgment appealed from should be affirmed, with costs.

CULLEN, Ch. J., GRAY, HAIGHT, WERNER and HISCOCK, JJ., concur; WILLARD BARTLETT, J., not sitting.

Judgment affirmed.

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HENRY MILBAUR, Respondent, *v.* OSCAR L. RICHARD et al., Defendants, and MICHAEL LARKIN et al., Appellants.

NEGLIGENCE — FALL OF BUILDING CAUSED BY ALLEGED NEGLIGENCE OF SEVERAL CONTRACTORS. The evidence examined in an action to recover the value of property injured or partially destroyed by the fall of a building containing plaintiff's shop, caused by the alleged negligence

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of the defendants, who were various contractors, engaged in the erection of an adjoining building, and held insufficient to sustain a recovery.

*Milbaur v. Richard*, 113 App. Div. 905, reversed.

(Argued May 1, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 31, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*David Thornton and Thornton Earle* for appellants. There is absolutely no evidence of negligence on the part of the appellants, and the learned trial court committed reversible error by continually insisting and charging that the excavators were liable. (*Wolf v. A. T. Society*, 164 N. Y. 130; *Cockran v. Sees*, 168 N. Y. 372; *Griffen v. Manice*, 166 N. Y. 188.)

*Herman Gottlieb and Julius Hilbern Cohn* for respondent. There was ample evidence of the negligence of the appellants in digging too close to the shoring supporting the wall of the premises which plaintiff occupied and the trial justice committed no error in his comments to the jury in regard thereto. (*Millis v. Germond*, 3 App. Div. 384; *Sindram v. People*, 88 N. Y. 197; *People v. Constantino*, 153 N. Y. 34; *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25; *Metcalf v. Gordon*, 86 App. Div. 373; *Winne v. McDonald*, 39 N. Y. 233; *Hart v. Ryan*, 25 N. Y. S. R. 986; *People v. Hess*, 8 App. Div. 148; *People v. O'Neill*, 112 N. Y. 364; *Vail v. Rice*, 5 N. Y. 159; *N. Y. F. Ins. Co. v. Walden*, 12 Johns. 590.)

O'BRIEN, J. The plaintiff conducted a tailor shop in a building at No. 33 Sheriff street in the city of New York. He brought this action to recover the value of certain property which he owned and which was in the shop at the time of the accident hereinafter mentioned. This property con-

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sisted of a portion of his stock, with the fixtures, machinery and other articles connected with his business. The owner of the premises adjoining the building occupied by the plaintiff was engaged in the construction of a new building which covered several numbers on the same street, that is, numbers from 27 to 33 Sheriff street. In the progress of this work the building containing the plaintiff's shop, which he occupied as a tenant, or at least a portion of it, fell, and in consequence the plaintiff's property was injured or partially destroyed. He brought this action to recover the value of the property and on a trial before a jury was awarded damages for the loss or injury. The judgment so recovered was affirmed on appeal and is now before this court for review.

The owner of the premises where the new building was in process of erection was made a party defendant and also various persons who, by contracts with the owner, were engaged in the work. One of the defendants had a contract for the erection of the walls; another for shoring up and securing the adjoining building in which the plaintiff's shop was located; and other parties, perhaps, for other parts of the work. One of the contractors died before the trial; another had a verdict in his favor, and the owner, by some arrangement between the parties, disappeared from the case. The only defendants that are interested in this appeal are the two Larkins, who had the contract for excavating for the foundation of the new building. The verdict was against these two defendants alone. It seems that they were partners in the business, and hence were jointly and severally liable for any negligent act or omission on their part in making the excavation, provided that such act or omission was the cause of the accident. Their contract was to excavate the open lot eighty-seven feet in front and one hundred feet deep. The excavation was to extend fifteen feet below the curb. These defendants were not connected in any other way with the transaction. Their sole obligation and duty was to make an excavation extending fifteen feet below the curb and covering a space of eighty-seven by one hundred feet.

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The decision of the learned court below was not unanimous, and hence the question is open upon this appeal for the inquiry whether there was any evidence that warranted the jury in finding, as the verdict imports, that the plaintiff's loss was occasioned by some negligent act or omission on the part of these defendants. In order to sustain this judgment the plaintiff must be able to point out some evidence of negligence on the defendants' part. A mere scintilla of evidence is not sufficient, but it was incumbent on the plaintiff to prove some fact that would fairly warrant the jury, as reasonable men, in finding that the plaintiff's property was lost or destroyed by some breach of duty on the defendants' part.

It is, doubtless, true that plaintiff's loss is due to the fault of some one engaged in the construction of the new building; but we are not concerned with the question as to the identity of the guilty party unless the evidence proves or tends to prove that the fault was that of the excavators; so that the only question that is necessary to be decided is the one already referred to, namely, whether there was any substantial evidence given at the trial upon which to base the verdict.

It is contended by the learned counsel for the plaintiff, in support of the judgment, that these defendants, against whom alone the verdict was rendered, while in the performance of their contract to make the excavation of the cellar and foundation of the building to be erected, so managed and conducted the work as to disturb and undermine the shoring timbers placed against the old building containing the plaintiff's shop, and that some of them gave way, and thus the structure, being deprived of the support which the timbers and needles gave it, collapsed, and hence the loss or destruction of the plaintiff's property. These defendants could not be made responsible for any defects in the shoring up of the building. That was the work of another contractor. The sole contention on the part of the plaintiff is that the Larkins, in the performance of their contract to make the necessary excavation, dug so near to the base of the shoring timbers that they fell or gave way, thus causing the accident. It was

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the right and duty of the excavators to perform their contract to dig a cellar and basement fifteen feet below the curb. If, however, in carrying out that contract they discovered that the shoring timbers were not set deep enough in the ground and would be undermined or weakened by the adjacent digging, they were bound to take notice of that fact and suspend operations until the owner or the plaintiff, or at least the contractor who had the contract for shoring up and securing the old building could be warned of the danger. It is quite conceivable that, even if the person who had the contract for shoring up and securing the old building, omitted to set the shoring timbers at the proper depth in the ground, still the defendants, if they knew that fact, could be held guilty of negligence if they continued to dig away the ground near the timbers and thus undermine them without calling the attention of the other parties to the danger. They had the right to make the excavation according to the terms of their contract, but could not ignore a situation which might result in disaster. It is upon this feature of the transaction that the plaintiff's case depends. The difficulty is that there is no evidence in the record to sustain this theory of liability.

There were three gangs of men working on the job at about the same time under different contractors, and there is great confusion in the testimony concerning the identity of each workman, and it is quite impossible from the testimony to trace out the work that each man was engaged in. It must be remembered that these defendants were excavating the open lot to a depth of fifteen feet below the curb and they had nothing to do with any other work, either upon the new or the old structure. The northerly line of the lot that they were excavating was the southerly line of the premises where the accident happened. The person who had the contract for shoring up and securing the old building was made a party to this action and answered the complaint. On the trial before the jury a verdict was found in his favor, and thus, upon the record he has been discharged from all liability for the accident and no negligence can now be imputed to him. His

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contract bound him to set the shoring timbers sixteen feet below the curb, or one foot deeper than the excavation which these defendants undertook to make. The testimony in the case is to the effect that the shoring contractor performed his contract in that respect. If it was true that he did not but on the contrary placed the shoring timbers only eight or ten feet below the curb it is difficult to see how the jury could have excused him from the charge of negligence. The defendants in cutting down the lot left a bank of earth along the north line four or five feet wide at the top and sloping down to a width of six or seven feet at the bottom. This was done so as not to disturb the walls of the old building. A part of this embankment was still there at the time of the accident but the greater part had been removed after the shoring contractor had placed supports under the wall. This shoring consisted of upright timbers resting on foot-blocks with needles at the top running into the building. A new foundation was being carried along under the old building but it had not reached the rear portion where the accident occurred and the evidence tended to show that some portion of the sloping embankment left by these defendants was still standing against a part of the rear of the building when it fell.

A trench had been dug by some one under the south wall of the old building at the point in question and the theory of the plaintiff was that this trench was dug too near the foot of the uprights, causing them to slip from their footings. This theory was adopted by the trial court, as his comments during the course of the trial clearly showed, and in his charge to the jury he says that: "It seems to me that, without some sort of excavating the wall could not come down and you may say whether or no there was negligence in excavating there." One theory of the defense was that a portion of the "dead work" had broken off and in falling had struck the uprights and knocked them from their footings. But the case went against the defendants manifestly upon the theory that they had been guilty of negligence in excavating too near the footings of the uprights. The plaintiff testified that when the

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men got ready to put in the new foundation they dug a trench four or five feet deep and two feet wide; that they commenced digging the trench from the front on Sheriff street and when they had dug about ten feet they built up a wall in the trench; that they then continued the trench toward the rear and that it was dug to within one foot of the vertical timbers supporting the building when it fell. He also assumed to identify one of the appellants in the court room as a man he had seen around there during the work of this excavating. A witness for the plaintiff testified that the trench in question was dug for a foundation wall and was within a foot of the vertical shoring. This was the character of the plaintiff's evidence, but none of his witnesses assumed to identify these defendants, or either of them, as directing this part of the work. They simply saw them around the job while the excavating was going on.

If it be assumed that the foot-blocks, upon which the shoring timbers rested, were one foot below any excavation which these defendants were bound to make or did make, it is very difficult to see how any digging which the defendants did could have affected the uprights or other arrangements made for the security of the old building. The defendants had nothing to do with the building of the new wall under the old building or digging the trench in which it was laid. All that was the work of other contractors. A careful examination of the record will, I think, show that the defendants, in the performance of their contract, did nothing but what they were bound to do. It fails to show that they omitted anything which can be said to be a duty imposed upon them in carrying on the operation prescribed in their contract. The plaintiff's theory that the defendants undermined the vertical supports by carelessly digging too close to them is not sustained by the evidence. The fact already mentioned, that the contractor, who was engaged in shoring up and securing the adjoining building, contracted to set the foot-blocks of the uprights one foot deeper than the cellar excavation, and the verdict in his favor on that point, in view of the testimony

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which is to the same effect, would seem to be a complete answer to the plaintiff's claim that the defendants caused the accident by careless digging, knowing the danger which would result.

It is, I think, reasonably certain that these defendants have been held responsible in damages for the result of an accident for which they were not at all to blame. It follows that the judgment should be reversed and a new trial ordered, costs to abide the event.

CULLEN, Ch. J., GRAY and WILLARD BARTLETT, JJ., concur; VANN, WERNER and CHASE, JJ., concur in result.

Judgment reversed, etc.

THOMAS F. ADAMS, as Trustee for HARMON W. CROPSEY et al.,  
Respondent, v. JUDSON LAWSON, Appellant.

EVIDENCE — WHEN DEFENDANT MAY PROVE, UNDER A GENERAL DENIAL, FACTS TENDING TO SHOW THAT FINAL PAYMENT IS NOT DUE UPON BUILDING AND LOAN CONTRACT. Where an action is brought to recover a final payment claimed to be due upon a building and loan contract, by which the defendant agreed to advance a certain sum toward the erection of a number of houses, such sum to be paid in installments as the work progressed, the defendant to have five days' notice of the completion of the work required for any installment, and the work to be approved by him before the payment of the installment, and if any of the materials or fixtures used in the construction of the buildings should not be purchased or paid for, so that the title thereto should pass upon the delivery thereof at the buildings, the defendant to have the right to withhold any further payments, and the complaint alleged the complete performance of the work in accordance with the contract, to which the defendant interposed a general denial, he is entitled to introduce evidence showing non-performance of the contract; that materials and fixtures were delivered under conditional contracts of sale, or subject to chattel mortgages; and that some of such materials and fixtures had been taken from the buildings with the knowledge or consent of the plaintiff subsequent to the giving of the notice of the completion of the work and during the five days allowed the defendant by contract to ascertain whether the buildings were in such a condition as to warrant him in making the final payment.

*Adams v. Lawson*, 112 App. Div. 886, reversed.

(Argued April 5, 1907; decided May 21, 1907.)

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Points of counsel.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 6, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

*John P. Everett* for appellant. It was established that respondent had not substantially performed his contract and the verdict was, therefore, against the law and the weight of evidence. (*Glacius v. Black*, 50 N. Y. 145; *McIntosh v. Rector, etc.*, 120 N. Y. 12; *Flaherty v. Minor*, 123 N. Y. 388; *Hamann v. Jordan*, 129 N. Y. 67; *Van Clierf v. Van Vechten*, 130 N. Y. 579; *Hollister v. North*, 132 N. Y. 18; *Crouch v. Gutman*, 134 N. Y. 51; *Miller v. Benjamin*, 142 N. Y. 617; *Desmond v. Friedman*, 162 N. Y. 490; *Spencer v. Ham*, 163 N. Y. 226.) The plaintiff failed to prove compliance with the conditions precedent to payment under the terms of the building loan agreement, and the complaint should have been dismissed. (*Fogg v. S. R. T. Co.*, 90 Hun, 274; *Oakley v. Morton*, 11 N. Y. 25; *Smith v. Brady*, 17 N. Y. 179; *Lauer v. Dunn*, 115 N. Y. 405; *Stevens v. Ogden*, 130 N. Y. 182; *Weeks v. O'Brien*, 141 N. Y. 199; *Bates v. S. S. N. Bank*, 157 N. Y. 325; *Mansfield v. Mayor, etc.*, 165 N. Y. 215; *Murphy v. B. Sav. Bank*, 39 Hun, 46.) The appellant's exceptions are meritorious, show reversible error and hence the judgment cannot be upheld, but must be reversed. (*Benton v. Hatch*, 122 N. Y. 322; *Milbank v. Jones*, 141 N. Y. 340; *S. M. E. Church v. Humphrey*, 142 N. Y. 137; *F. L. & T. Co. v. Siefke*, 144 N. Y. 358; *Griffin v. L. I. R. R. Co.*, 101 N. Y. 348; *Brady v. Hutkoff*, 34 N. Y. Supp. 945; 155 N. Y. 681; *Moore v. Taylor*, 42 Hun, 45; *Wharton v. Winch*, 141 N. Y. 293; *McCready v. Lindenborn*, 172 N. Y. 408; *Jones v. City of New York*, 57 App. Div. 406.) The evidence is that appellant did not waive the covenant requiring a five days' days' notice for a payment due thereon. (L. 1897, ch. 418; L. 1890, ch. 78.)

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*Melvin G. Palliser and Hector M. Hitchings* for respondent. Although the building loan required the work done on the buildings to meet the approval of Mr. Lawson before a payment could be exacted, yet such approval could not be withheld captiously or unreasonably, and, if the work was so advanced that Lawson ought to have approved, his refusal to approve furnished no justification for his refusal to make a payment when demanded and no ground of defense. (*McK. F. S. Co. v. Mayor*, 160 N. Y. 72; *Doll v. Noble*, 18 Abb. [N. C.] 45; *Cross v. Belknap*, 24 Wkly. Dig. 256.) Defendant's positive and unequivocal refusal on October fourteenth to make any further payment on the contract relieved the plaintiff from giving him any further notices or making any further demands. (*Bunge v. Koop*, 48 N. Y. 225; *Bauman v. Pinckney*, 118 N. Y. 616; *Thomas v. Stewart*, 132 N. Y. 580.) Defendant was necessarily limited on the trial to the grounds of his refusal to make payments stated by him when such payments were demanded and he refused to make the same. (*Fallon v. Lawlor*, 102 N. Y. 228; *Thomas v. Stewart*, 132 N. Y. 584.) The exceptions taken to the refusal of the trial justice to allow defendant to probe into what occurred to these buildings after defendant had broken his contract and this action had been begun are clearly frivolous and the rulings entirely correct. (Code Civ. Pro. § 501; *J. C. Co. v. Clark*, 77 Hun, 466; *Vanderslice v. Newton*, 4 N. Y. 130; *Lord v. Spelman*, 29 App. Div. 292; *Smith v. L. V. R. R. Co.*, 177 N. Y. 379.)

EDWARD T. BARTLETT, J. The plaintiff, as trustee for the benefit of certain creditors, seeks in this action to recover damages for the alleged breach of a building loan agreement.

The Appellate Division having unanimously determined that there is evidence supporting or tending to sustain the verdict of the jury, we are precluded from examining any question of fact.

A statement of a few of the undisputed facts will render clear the questions of law presented by this appeal. On the

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6th of February, 1902, the defendant sold and conveyed to Dawson B. Hilton and Gustave Levy certain vacant lots in the borough of Brooklyn. On even date with this transaction Hilton and Levy entered into a written building contract with the defendant whereby they agreed to erect upon the premises so conveyed to them ten houses, according to certain plans and specifications, and the defendant covenanted to advance from time to time a sum aggregating twenty-five thousand dollars, being twenty-five hundred dollars on each house, under conditions not necessary to state at this time. Hilton and Levy, after proceeding under this contract for a time, became financially embarrassed and assigned their interests in the premises to the plaintiff, Thomas F. Adams, as trustee for the creditors set out in the complaint in this action. The defendant assented in writing to this transfer to the plaintiff Adams, subject to certain provisions, and extended the time of completion of the buildings called for in the building loan agreement for the period of ten weeks from July 26th, 1902.

On the same day the defendant and the plaintiff entered into a further agreement in writing whereby the plaintiff agreed to take over from Hilton and Levy a deed of the premises conveyed to them by the defendant and an assignment of their interests in the building loan agreement; and the plaintiff also agreed to use his best endeavors to procure the discharge of all mechanics' liens filed against said buildings and to comply generally with the conditions of the building loan agreement. On the same day the plaintiff entered into an agreement with six of the creditors of Hilton and Levy, wherein they agreed to discharge certain mechanics' liens and continue under the contract. On the 10th of October, 1902, the defendant and the plaintiff stipulated that the contract time for carrying out the agreement should be extended to the 24th of October, 1902.

The two provisions of the contract having an important bearing upon the exceptions presented by this appeal are the following: The "Third" subdivision of the contract reads, in

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part, as follows: “\* \* \* or if any materials, fixtures or articles used in the construction of said buildings or appurtenant thereto be not purchased by the parties of the second part so that the ownership thereof will vest in them on delivery at said buildings, that then or on the happening of either or any of said events, said party of the first part may refuse to advance any sum called for by this agreement beyond those advanced at the time of the happening of such event, etc. \* \* \*

Subdivision “First,” paragraph 5th of the contract reads as follows: “That when the respective stages of completion of said buildings shall be respectively reached by the said parties of the second part, before they shall be entitled under this agreement to receive the installment before provided to be paid under such respective stage of completion, they shall notify the said party of the first part at least five (5) days beforehand of the fact that they are ready for a payment, and the approval of the said party of the first part first had as to the work done before such payment or payments is or are made.”

As before stated, the time for the performance of this building contract was extended until Friday, the 24th of October, 1902. On the evening of that day the defendant was notified over the telephone by the plaintiff's attorneys that the last payment under the contract was due, being the sum of thirty-five hundred dollars. There was a conflict in the evidence as to the nature of this colloquy over the telephone, but with that we have no concern. There is no dispute as to the attorneys for the plaintiff having made this demand. Thereupon the time was set running under the above-quoted clause of the contract, which provided that the contractors were to notify the defendant “at least five (5) days beforehand of the fact that they are ready for a payment, and the approval of the said party of the first part first had as to the work done before such payment or payments is or are made.” This provision must be construed as a further extension of the time for five days after the payment is actually due, according

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to the terms of the contract, in order to enable the defendant to ascertain by deliberate examination whether there has been such a completion of the contract as requires him to make the payment sought to be collected.

It is undisputed that the plaintiff, Adams, was a clerk in the office of his attorneys and that Mr. Hitchings of that firm was practically in control of his interests, as was quite natural under the circumstances. It is also undisputed that mechanics' liens for a large amount were filed on Saturday morning, the 25th of October, 1902.

This action was subsequently commenced to recover, not the final payment due under the contract of \$3,500, but for damages in the sum of \$9,500 and interest from the 25th of October, 1902. The defendant's answer, after several admissions as to facts not controverted, was substantially a general denial, the complaint having alleged full performance on the part of the plaintiff. The jury rendered a verdict apparently for the final payment of \$3,500 with interest and judgment was entered for that amount, with costs.

At an early stage of the trial the question was sharply presented as to the character of evidence that the defendant was entitled to introduce under his general denial. The complaint in brief was the allegation that the plaintiff had performed the building contract on his part; that the final payment of \$3,500 was due on the 24th of October, 1902, and by reason of defendant's default he was damaged in the further amount of \$6,000. The answer denies these allegations; in other words, the defendant asserts that the final payment of \$3,500 was not due by the terms of the contract on the 24th of October, 1902, and that he was entitled to sustain that general denial by competent evidence. The question now presented is whether his right in this regard was improperly limited by the trial judge, thereby excluding from the consideration of the jury evidence that might have led them to a different conclusion.

In the case of *Farmers' Loan & Trust Co. v. Siefke* (144 N. Y. 354, 358) Chief Judge Andrews said: "But as

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the pleading stood the question whether the defendant had executed a sealed instrument was an issuable fact which was asserted upon one side and denied upon the other and which the plaintiff was bound to establish as a part of his case. The defendant under a general denial may adduce evidence to controvert what the plaintiff is bound to prove in the first instance (*Milbank v. Jones*, 141 N. Y. 345, and cases cited), and the general rule is well established that whatever a plaintiff is bound to prove in the first instance as a part of his case he is bound to establish by a preponderance of evidence." (*Wheeler v. Billings*, 38 N. Y. 263; *Schwarz v. Oppold*, 74 N. Y. 307; *Griffin v. Long Island R. R. Co.*, 101 N. Y. 354; *Gilman v. Gilman*, 111 N. Y. 265, 270.)

In *Benton v. Hatch* (122 N. Y. 322) it was held that under an answer denying the allegations of the complaint in an action of ejectment, the defense of want of title in plaintiff is admissible.

The defendant was desirous of proving the non-performance of the contract; that the clause already cited providing in substance that where the materials, fixtures or articles used in construction were not purchased so that the ownership thereof would vest in the contractors on delivery at the buildings, he was entitled to refuse performance on his part. The defendant further desired to show that there had not been full performance of the contract; that materials, fixtures and articles were delivered under conditional contracts of sale prior to the time of performance; also that certain materials, fixtures and articles had been removed from the buildings prior to the 24th of October, 1902, and subsequent thereto during the five days allowed the defendant by contract to ascertain whether the buildings were in such a condition as to warrant him in making the final payment.

After some ineffectual efforts the defendant was permitted to make this offer: "We desire to prove that these houses were never finished; that when we went into possession they were destroyed, the mantels were torn out and the houses were practically taken apart under the instructions of Mr. Hitch-

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ings by written communication to each creditor." Before ruling upon this question there was a colloquy between the court and counsel for both parties. Mr. Hitchings said: "What took place subsequent to the 26th of October had absolutely nothing to do with this action." It will be observed that the plaintiff's counsel took the position that notwithstanding the defendant had been allowed five days in order to ascertain whether the final payment was in fact and in law due, yet he was practically to be deprived of his rights, although he had the entire day of October 29th in which to decide as to his legal rights. A long discussion followed between court and counsel, in which the plaintiff's counsel insisted that this proof was not admissible under a general denial. Thereupon the defendant offered to amend by setting up affirmatively such matters as he desired to prove, stating that he cared nothing for a counterclaim as he did not think it collectible. The latter suggestion was apparently made by defendant's counsel in view of the statement of the trial judge that he could not set up a new cause of action. The offer of proof and the offer to amend, the latter being wholly unnecessary, were overruled and the defendant duly excepted.

If the defendant had been able to prove that these houses were not finished on the 24th of October, or if he could have established the fact that there were materials and fixtures placed therein prior to that day under conditional bills of sale, he was entitled to do so under his general denial. Furthermore, he should have been allowed to prove, if he could, all that happened during the five days succeeding the 24th of October; he was also entitled to prove, if possible, that certain parties had been requested by plaintiff's counsel, either verbally or by letter, to exercise their supposed right of removal from the buildings of materials or fixtures either before the 24th of October, or during the five days next succeeding; also to have shown, if he could, that mantels and other fixtures and materials were forcibly removed from said buildings during the period aforesaid.

One of the plaintiff's counsel admitted, upon the stand,

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that there were conditional bills of sale. He was asked this question : " Do you know which of these materialmen had conditional bills of sale ? " This was objected to, but allowed. The answer was : " I can give some of them ; I don't know that I could give them all. Mr. Donovan, his material was in there ; the plumbing, ranges, mantels, tiling, gas fixtures ; that is all I recollect at the present time." The witness subsequently stated that he knew these materials under such conditional bills of sale were less than \$3,500 in value, the amount of the final payment. As to this question of the amount of property furnished under conditional bills of sale and its value the defendant was entitled to introduce proof, as the witness only dealt in general terms as to the materials and fixtures involved.

Donovan, above alluded to, when on the stand, was asked this question : " After getting the chattel mortgage or the conditional bill of sale, did you subsequently remove the plumbing work ? Objected to as incompetent, immaterial and irrelevant," and the defendant excepted. The defendant sought to prove by Mr. Hitchings, when on the stand, that he had knowledge of the removal of furnaces ; he was asked whether he had ever written a letter in which he had referred to the removal of these furnaces ; or whether he had ever written any letter on the subject whatsoever. All of these questions were ruled out as irrelevant and immaterial and exceptions taken.

We are of opinion that the ground covered by this offer and the exceptions to specific questions that were overruled involve subjects concerning which this defendant was entitled, under the general denial, to adduce such proof as he had tending to controvert those facts that plaintiff was bound to prove in order to establish his cause of action.

The judgment and order appealed from should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, J. (dissenting). The material facts in this case may be stated very briefly. The plaintiff had a building contract

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N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

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to build ten detached houses in Brooklyn on land which the defendant had conveyed to the plaintiff's assignors in consideration of the sum of twelve thousand dollars. Coupled with this transaction the defendant agreed in writing to make a building loan of twenty-five thousand dollars, to be used in the construction of the houses, and in order to secure the defendant for his advances on the contract there was a building loan mortgage in favor of the defendant. Under the contract the defendant was to make advances of money from time to time as the work progressed. There is no controversy in regard to any of these advances except the last one which was due and payable upon completion of the houses. That payment, assuming it was due, amounted to thirty-five hundred dollars, and that sum the plaintiff has recovered upon the verdict of a jury.

The buildings were by the terms of the contract as extended to be completed on the 24th of October, 1902. The contract contained a provision that the defendant should be entitled to five days' notice that a payment should be required by the plaintiff, the builder. The effect of that provision is that, although the builder had become entitled to the payment by reason of the fact that the houses had reached the stage of completion provided by the contract, yet the defendant should have five days after the notice within which to make the payment. This provision applied to all the payments provided by the contract, as well as to the final payment, which is the only one with which we are concerned in this case. The contract provided that the payment which the plaintiff has recovered in this case should be made when the houses were completed; and the fundamental questions in the case were whether the plaintiff had in fact performed his contract of completing the houses, and whether the defendant had waived the provision which gave him five days in which to make the payment.

There was much testimony given at the trial bearing upon the question whether the houses had been completed according to the contract. There was also testimony given to show that the defendant had waived the provision as to five days'

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notice referred to by notifying the plaintiff before the time had arrived that he would not make the final payment, that he had put all the money into the houses that he intended to, and in fact stated that he would foreclose his mortgage on the property. It is, I think, to be inferred from what appears in the record, and in the briefs of counsel, that either before or since the commencement of this action the defendant had instituted proceedings to foreclose the mortgage and thus acquire title to the property. The learned judge at the trial submitted two questions to the jury, first, whether the plaintiff had completed the construction of the houses under the contract; and, secondly, whether he had waived the provision which gave the defendant the five days within which to make the payment. The judgment entered in the plaintiff's favor upon the verdict of the jury has been unanimously affirmed at the Appellate Division and, hence, the two fundamental facts in the case are conclusively established so far as this court is concerned. It is unnecessary to cite authorities in support of that proposition. This court is irrevocably committed to the doctrine that even if the evidence in the case on these questions was overwhelmingly in the defendant's favor, we are bound to assume that the verdict upon the facts and as to the general merits of the case is correct.

We need not, therefore, look into the evidence for light upon questions thus established. The learned trial judge gave the jury very full and fair instructions with respect to these questions. They were told that unless the houses were completed in substantial conformity to the contract that their verdict should be in favor of the defendant, but that if upon the evidence it appeared that they were substantially completed then so far the plaintiff was entitled to recover. He also instructed the jury that the defendant was entitled to the five days provided by the contract to make the payment after the completion of the building unless the defendant had waived that provision by notifying the plaintiff in advance that he did not intend to make the payment and would not as he had already put into the houses all the money he intended to.

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The defendant is, therefore, concluded by the verdict of the jury on the questions litigated, namely, whether the houses were completed, and whether there was a waiver of the five days' provision in the contract.

There is nothing of the case left for review in this court save only the exceptions taken by defendant's counsel on the trial arising upon rulings of the court. There are some exceptions in the record taken to the charge of the court to the jury, but they are not argued by the learned counsel for the defendant either orally or upon his brief, and hence I conclude that the counsel did not intend to raise them. If they were before us for review it is obvious that they are without merit, and so it may be assumed that the only questions presented by the record are the exceptions taken at the trial to rulings upon matters of evidence.

These exceptions relate to a feature of the case that is liable to mislead the mind, as it evidently has misled the defendant's counsel. In general terms that feature of the case may be stated as follows: It is said that the contract provided that the houses should be passed to the defendant without liens or claims of that character; that some of the materials that went into the buildings were purchased under conditional sales which were to the effect that the title should remain in the seller until the goods were paid for, and that some time after the 24th of October, the day which by the verdict of the jury the plaintiff completed the contract, certain parties entered the house and took therefrom mantels set into the walls and other things of that character which were delivered upon conditional sales. Whatever evidence there is in the case or which was offered is involved in much confusion and obscurity. It is impossible to tell from the record when this looting, as it is called by the defendant's counsel, happened or who the parties were that engaged in it. This defense, if it be one, is very vague as to the time, place or person. It is very difficult to state the details of these transactions from anything that is presented on the argument. Nothing of that kind appears from the defendant's answer; that pleading did put

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in issue the plaintiff's claim that the houses had been completed, but, as already stated, the verdict of the jury has determined that question in favor of the plaintiff.

It seems to me that the vague and very confused claim of the defendant in regard to what is called "looting" proceeds from a mistake as to the law or the facts, or both. A conditional sale of material to be used in erecting a building cannot very well be conceived of after it has been used and attached to the structure. When the houses in question were completed they became a part of the real estate. The right of the seller upon a conditional sale could not in the nature of things exist only up to the time when the personal property was transformed into real estate. If a dealer in brick, stone or iron should sell these materials to a builder and the builder had used them in the construction of a house, the seller could not well reclaim them upon the idea that the sale was conditional and the title did not pass upon such a sale. If the seller permitted them to be used in the construction of a building he would not be entitled to pull down the building in order to reclaim some of the materials used in its construction. He may of course file a lien for these materials, but if he could tear down the structure, whether it be great or small, on the claim that the sale was conditional, then obviously the statute in regard to liens was unnecessary. The seller of materials could always, according to the defendant's contention, make a conditional sale, and if payment was not made at the time agreed upon he could pull down the house and reclaim the materials no matter who the owner was. If these houses were looted, as the defendant claims, then it must have been done by some one who was a trespasser, since it could not in any legal sense be done by the person who furnished the materials upon a conditional sale; and yet it is upon some such notion as has here been outlined that the defendant relies for a reversal of the judgment. Of course if the plaintiff had completed the houses, as the jury found, on the 24th of October, the law day prescribed in the contract, then he is not responsible for any wrongs or trespasses that may have

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been committed by third parties subsequently. So that it seems to me the contention of the defendant that the plaintiff is in some way responsible for the wrongs or trespasses of third parties is based upon a fundamental error.

The only exceptions argued by the defendant's counsel, or to be found on his brief, relate to this particular question. He complains that he was not permitted to go into the facts to show, as he says, that the houses were looted. Who did the wrong, or when, and to what extent, if at all, are questions that are not disclosed by the offers or the record in such a way as to enable us to deal with the question, if it is at all involved in the case. It will be entirely fair to the defendant to review the exceptions as they appear upon the briefs of his counsel. In the third point of the defendant's counsel's brief there was an offer to prove certain things. It reads as follows: "We desire to prove that these houses were never finished; that when we went into possession they were destroyed, the materials were torn out and the houses were practically taken apart under the instructions of Mr. Hitchings by written communications to each creditor." So far as this is an offer to prove that the houses were never finished that question was fully litigated and submitted to the jury. Then the offer is in regard to certain things "when we went into possession;" that is, that the houses were destroyed, the materials were torn out and the houses were practically taken apart under the instructions of Mr. Hitchings by written communication to each creditor. Now Hitchings was not a party to this action. The plaintiff was not responsible for Hitchings in any way, and then it is said all this was done by a "written communication." I think that the trial court very properly refused to listen to a mere offer so vague and extravagant and so foreign to the issues involved. Moreover, it called for the contents of a written communication, and if the contents were at all material the writing should have been produced or accounted for. The offer to show a state of things existing when the defendant went into possession, without stating when such possession was begun, was properly rejected.

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If this class of evidence was admissible at all it should have been confined to a time anterior to the completion of the houses, as found by the jury, on the 24th of October. In the same point the counsel for the defendant contends that a series of questions put to Mr. Hitchings when he was on the stand should have been admitted. These questions were in substance as follows: Whether any one ever told him that the furnaces had been removed, and whether he ever wrote a letter in which he referred to the removal of the furnaces, or whether he ever wrote any letter on that subject. I am unable to perceive the relevancy of these questions. They call for hearsay statements at best, and also for the contents of some letter that the questions assumed the witness had written to some one at some time. So far as this record shows, at most there was an attempt on the part of the defendant's counsel to show in some vague and loose way that some one not named, at some time not specified, did certain things by which the houses were destroyed and practically taken apart. The defendant's fourth point is simply a statement that the defendant did not waive the provisions of the contract regarding a five days' notice for payments due thereon. All that is necessary to say in regard to that point is that the proofs show that the defendant notified the plaintiff in advance that he would make no further payment on the contract. The jury found that the defendant took that position and they were instructed by the court that under such circumstances they might find that the notice had been waived. I take it to be elementary law that when a contract provides for a notice that the payment of money at a certain time will be insisted on and a notice is given by the person bound to pay to the person entitled to receive it that the former does not intend to pay and will not pay, he may be taken at his word and held for a breach of the contract, and the formalities prescribed by the contract at the time of payment, such as notice that it will be received as in this case, are waived. It would be an idle ceremony on the part of the plaintiff, after the defendant had given notice that the final payment would not be made, to

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give the notice and wait five days for the defendant to comply with the provisions of the contract, when he had already taken the position of ignoring all obligations on his part to make the payment. Whether the defendant had taken such position was a question for the jury, and the finding in the plaintiff's favor, unanimously affirmed, is conclusive on this appeal.

I have now referred to all the exceptions argued or presented on the brief of the learned counsel for the defendant. No exception taken to the charge is argued or discussed in any form, and, therefore, it must be presumed that they are abandoned. All we have is a general statement to the effect that all the exceptions taken to the charge or refusal to charge are a good and sufficient reason for the reversal of the judgment. Such a general and sweeping assertion in regard to the charge does not call for much discussion. If the trial judge committed error in that respect the defendant's counsel should have put his finger upon the point and not left it to this court to grope its way through a record in order to find some error upon which to disturb the judgment. There are, however, one or two paragraphs in the charge which may be noticed since they show very clearly the principle upon which the case was tried and submitted to the jury. The learned trial judge said: "It has crept into this case that after the 25th of October some of these persons who had furnished material went in and took out mantels and other things. That does not affect the verdict in any way in this case. The question is were the buildings completed on the 24th? If so, the plaintiff can recover. If not, he cannot recover. In respect to small things that were unfinished that might reasonably, naturally be overlooked or incompletely in so large a contract as this—if you find there was a substantial completion in the case, then you may come to the conclusion that the plaintiff is entitled to recover." The other proposition of the learned trial judge is as follows: "Now in respect to the liens in this case; the testimony is they were filed on that night or the next morning—the night of the 24th or the next morning. If you find that the defendant absolutely

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refused, made an absolute refusal to pay and at the time he did there were no mechanics' liens upon this property and the work was at that time finished, then the plaintiff's cause of action was complete and the mechanics' liens afterwards put upon the property, if there was an absolute refusal upon his part, would not affect the plaintiff's right to sue and recover in this action."

It is assumed in the prevailing opinion that the date for the completion of the houses was the 29th of October instead of the 24th of October. It seems to me that this assumption entirely ignores the record. This date is fixed by adding the five days to the law day provided by the contract, which was October 24th. The provision in regard to the five days was simply this: It required the plaintiff to notify the defendant five days beforehand of the fact that he was ready for a payment. Plainly this called for some action on the part of the plaintiff; that is, he was required to give notice that he was ready to receive the payment. He did not give the notice for the reason that the defendant had waived it. This provision of the contract was not an agreement to pay money, since that was provided for in the original agreement; but it was a stipulation that the plaintiff should give a certain notice. Surely the defendant could waive the right to such notice, and the question was submitted to the jury to find whether he did or not, and the finding was that he had waived it, and that finding has been unanimously affirmed, and yet the prevailing opinion treats the question as if the jury had found the other way. The question whether the law day was the 24th of October or the 29th is a vital question, but it seems to me that it is settled by the verdict of the jury, unanimously affirmed. The jury found that the plaintiff was not obliged to give the notice after he had been informed by the defendant that no further payment would be made. To say that after this declaration on the part of the defendant the plaintiff was still bound to give the notice, is to say that he was bound to do a vain thing.

The other point in the case relates to the materials which it

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is said that the plaintiff or the builder procured under conditional sales. It is assumed that such sales affected the title to building materials after they had been attached to the real estate and entered into the construction of the building. It has already been pointed out that the condition attached to the sale, if there was such a condition, ceased to have any operation or effect after the materials had been used in the structure. So we come back again to the fundamental question whether the houses were completed on the 24th of October. That question was one of fact and was submitted to the jury, and the finding was in favor of the plaintiff, and having been unanimously affirmed it is not open to discussion here. What happened afterwards has no bearing on the case. If the plaintiff completed his contract on the 24th of October the acts of third parties in tearing out mantels or in pulling the houses apart, if they ever occurred, had nothing to do with the issues in the case. I have not been able to find in the record, nor in the prevailing opinion, any offer to prove any fact tending in the least to show that the houses were not completed on the 24th of October, which was rejected by the trial judge. That, it seems to me, is the crucial question in the case. Offers made to show what happened subsequent to the 29th of October, if made, were properly excluded. If proof of any fact occurring prior to the 24th of October tending to show that the houses were not completed on that day had been excluded at the trial, I admit that it would be error. But the record does not disclose any such ruling at the trial, and I am unable to find that anything of that kind has been pointed out in the prevailing opinion.

Any liens that attach to the property at any time must be measured by the sum found due from the defendant on the contract; that is to say, the lien attached to the money due or payable as the final payment. There is no evidence in the case that any lien was filed against the property after the plaintiff took over the contract and prior to the completion of the work on the 24th of October. If the contrary was claimed in behalf of the defendant, then the attention of the

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court should have been called to it at the trial, and, if necessary, the question submitted to the jury; but no request of that character was made by the defendant's counsel. The whole case was allowed to go to the jury without any request made in behalf of the defendant. I think that the record in this case does not present any question of law that this court is authorized to review, and the judgment should, therefore, be affirmed, with costs.

CULLEN, Ch. J., HAIGHT, VANN, HISCOCK and CHASE, JJ., concur with EDWARD T. BARTLETT, J.; O'BRIEN, J., reads dissenting opinion.

Judgment and order reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.  
NEWTON L. A. EASTMAN, Respondent.

CRIMES—INDECENT PUBLICATIONS—PENAL CODE, § 817. The word "indecent," as used in section 317 of the Penal Code, relates to obscene prints or publications. It is not an attempt to regulate manners, but it is a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. A publication, therefore, attacking a body of Christian clergymen, although vile, scurrilous and reprehensible, is not indecent unless it is lewd, lascivious, salacious or obscene and has a tendency to excite lustful and lecherous desire.

*People v. Eastman*, 116 App. Div. 922, affirmed.

(Argued April 4, 1907; decided May 21, 1907.)

APPEAL from a judgment and order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 8, 1906, which affirmed a judgment of the Monroe County Court sustaining a demurrer to an indictment charging the defendant with the crime of selling and having in his possession with intent to sell printed matter of an indecent character.

The facts, so far as material, are stated in the opinions.

*Howard H. Widener* and *Stephen J. Warren* for appellant. The statute itself is descriptive of the offense and does

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N. Y. Rep.]Opinion *Per Curiam.*

not describe or attempt to define what is indecent, but forbids "printed matter of an indecent character." (*People v. Muller*, 96 N. Y. 408; *Regina v. Hicklin*, L. R. [3 Q. B.] 369.)

*Albert H. Stearns* for respondent. The publication referred to in the indictment is not "indecent" within the meaning and intendment of section 317 of the Penal Code. (*People v. Muller*, 96 N. Y. 408; *People v. Allen*, 20 Misc. Rep. 120; *U. S. v. Hartwell*, 6 Wall. 396; *U. S. v. Wilson*, 58 Fed. Rep. 768; *People v. Most*, 171 N. Y. 423; *U. S. v. Smith*, 11 Fed. Rep. 663; *U. S. v. Bennett*, 16 Blatchf. 338; *Dunlop v. U. S.*, 165 U. S. 486; *Swearingen v. U. S.*, 161 U. S. 447; *U. S. v. Wrightman*, 29 Fed. Rep. 636; *McJenkins v. State*, 10 Ind. 140.)

*Per Curiam.* The court is of opinion that the publication set forth in the indictment is improper, intemperate, unjustifiable and highly reprehensible, nevertheless it is not "indecent" as that word is employed in section 317 of the Penal Code.

The definitions given by the standard lexicographers are not controlling in deciding its legal signification; many meanings as used in ordinary conversation are also irrelevant.

Section 317 of the Penal Code is found in chapter VII, headed as follows: "Indecent Exposures, Obscene Exhibitions, Books and Prints, and Bawdy and Other Disorderly Houses."

Section 317 opens as follows: "§ 317. Obscene prints. 1. A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession, with intent to sell, lend, or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, *newspaper*, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character;"

It is clear from the manner in which the legislature has

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people of the state been to secure freedom of speech, subject only to punishment when a jury has found that that freedom has been abused, that by the various Constitutions of this state, ever since that of 1822, it has been expressly enacted that in a prosecution for libel the truth may be given in evidence and the jury shall have the right to determine the law as well as the fact. This applies to no other criminal prosecution.

O'BRIEN, J. (dissenting). The defendant was indicted for selling and exposing for sale certain printed matter of an indecent character. The publication was in a newspaper called "The Gospel Worker." By section 317 of the Penal Code it is made a misdemeanor to sell, or to have in possession, with intent to sell, or to publish, any written or printed matter of an indecent character.

The defendant demurred to the indictment on the ground that it did not state a crime. The demurrer was sustained at the trial court and at the Appellate Division and the People have appealed to this court. The decision under review is to the effect that the paper referred to in the indictment and set out at length is not of an indecent character and, therefore, not within the statute. In this respect I think the courts below were clearly in error, since, in my opinion, it would be difficult to compose any writing more indecent and more immoral. It is so indecent that, in my opinion, it is unfit to appear upon the records of this court and it would not appear as a part of this opinion except for the contention at the bar and in the court itself that it is *not* indecent. Of course, if it is not, then I must be in error in supposing that it is unfit to appear in the records of this court. Therefore, we must allow the writing to speak for itself; and here it is:

**"THE OPEN DOOR TO HELL"**

"Is the confessional box. It is hell's gate. The mainspring to lust. The very embodiment and focus of the virus of hell. It is the very matter and pus that runs from the corpse in hell. It is the pollution and rottenness of the decay of ages.

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N. Y. Rep.] Dissenting opinion, per O'BRIEN, J.

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It is the cesspool, the recipient, the reservoir of lust, of vile thought and communication, adultery, the birthplace of sexual criminality, with men's wives and young girls, and the convent is earth's terminus and hell, the lake of fire is the dumping-ground. It is the criminal college. The mother of prostitution. The author of pauperism. From it emanates poison to society, homes, our schools and government. I speak in love. No time to trifle. The Anaconda is drawing itself over many a threshold and stinging thousands to death. Hark! A voice from the tomb, the blood of the innocent crying out, in what sense is the confessional box needed? The Word of God says, in 1 John, 1, 9, If we confess our sins, He is faithful and just to forgive our sins and to cleanse us from all unrighteousness. You go direct to God Almighty through Jesus Christ to confess your sins. Not in a concealed and seclued place alone. No wife can go with her husband. Here the priest asks the vilest of questions, and of course the husband could not be present. He asks the most delicate and intimate questions. But under what obligation is any one to a priest? What business has he got to go into a box and ask delicate female questions that no minister of Jesus Christ or true gentleman on earth would ask? Right here in the confessional box many have been ruined, and many become mothers as a result; and men, you are paying your money to priests and to a church that is ruining your daughters and stealing the affections of your wife, until he knows more about her than you do. She has many secrets kept from you, husband, but not from that licentious priest. This is all true, dear reader, and can be proven by thousands of witnesses. May it not well be called the open door to hell? Last month a dear brother gave The Gospel Worker to some in the place where he was at work in this city. It was the January number with the article, 'Break open the Doors and Look In,' and it caused much excitement. Bloody threats and curses were made, and two could not sleep all night, they were so stirred over the truth in it. Was any one ever benefited in any way by going to the confessional box? If it

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is advice you need why go to that secret place? Dear reader, Jesus Christ never instituted the confessional. Would he call lustful, licentious, drinking men to ask such low, vile questions, which are unbecoming for any one to ask another? I am sure you say no and begin to see the awfulness of it. You might as well confess to a dead dog. The Roman Church teaches you cannot be saved unless you confess to a priest. Read this from their own teaching: 'If any one shall say that priests who are in mortal sin have not the power of binding or loosing, or that priests are not the only ministers of absolution, let him be accursed.' This does away with Jesus' blood. It makes God second to this fellow in the confessional box. They teach that every sin, the vilest and lowest, the most criminal, by man and woman, must be confessed to the priest. They do not teach it necessary to repent, but to do penance. Notice, this takes the place of repentance. Penance and confession to a wicked priest necessary to salvation? Is there any intelligent person on the earth who believes it? The following is what Margaret L. Shepard, who was for three years an inmate of the Arno's Court Convent, Bristol, Eng., says: 'In a confessional the depth of corruption and womanly degradation is reached. There the seeds of hell are planted in the soul. The thoughts of a young girl are polluted. Her heart is polluted, her mind becomes familiarized with the most revolting sins of impurity. The lessons engraved in the memory, the heart, the thought, the soul, like the sear of a red-hot iron, leaves its scar. In the confessional young unmarried and married women get accustomed to hear and repeat without a scruple things which would cause even a fallen woman to blush.' These are the words of one who has been through the above and escaped from their murderous hands. I will close with the above. It is a clincher and positive evidence and witness of all I have said. All unite with me in prayer that the above will open the eyes of many deceived Romanists and come to the blood of Christ.

"N. L. A. EASTMAN."

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If this paper is not of an indecent character and within the prohibition of the statute, then it is impossible, as I think, to conceive of any printed matter that would be. It would seem to be a work of supererogation to argue, or to cite authorities, in support of the proposition that a writing so vile and nasty as this appears to be is of an indecent character; but since there appears to be some difference of opinion on the point, whether the writing is indecent or not, I will add that no court has ever held that such a publication could be anything but indecent, at least all the decisions, as I understand them, hold that such a paper is an indecent publication.

Judge ANDREWS, in *People v. Muller* (96 N. Y. 408), in speaking of section 317, says: "The words used in the statute are themselves descriptive. They are words in common use and every person of ordinary intelligence understands their meaning and, readily and in most cases accurately, applies them to any subject or thing brought to his attention which involves a judgment as to the quality indicated. It does not require an expert in art or literature to determine whether a picture is obscene or indecent, or whether printed words are offensive to decency and good morals." Reading the article in question and then applying the common-sense test laid down by Judge ANDREWS, it is difficult to see how it could be better defined than as an indecent publication. A few definitions may, however, be given of the word "indecent" used by the lexicographers. Worcester defines it as something "unbecoming; unfit for the eyes or ears." The Century Dictionary defines it as that which is "obscene or grossly vulgar; unbecoming, unseemly, violating propriety of language, behavior, etc." The Imperial Dictionary defines it as "that which is unbecoming in language, actions or manners." In the case of *United States v. Loftis* (12 Fed. Rep. 671) the opinion states that the term "indecent" signifies "more than indelicate, and less than immodest;" that it means "something unfit for the eye or ear."

In reading this statute there may be some danger of falling into the error of construing "indecent" as synonymous with

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"lewd, lascivious," etc., used in connection with it, but an examination of the language of the section, from its appearance in the original Code of 1881 to the present time, clearly discloses that the word does not necessarily have any reference to morals. The prohibition is against an "obscene or indecent" publication.

In *Reg. v. Hicklin* (L. R. [3 Q. B.] 360) the defendant was charged with misdemeanor for selling a book entitled "The Confessional Unmasked; showing the depravity of the Romish Priesthood, the iniquity of the Confessional and the questions put to females in Confession." COCKBURN, C. J., writing the opinion sustaining the charge, says: "The very reason why this work is put forward to expose the practices of the Roman Catholic Confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief in the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case between the priest and the person confessing, it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy, disgusting and unnatural description it is possible to imagine. \* \* \* We have it, therefore, that the publication itself is a breach of the law." It would seem to be impossible to distinguish that case from the one at bar.

In *Steele v. Brannan* (L. R. [7 Com. Pl.] 231) the question was involved as to the defendant's guilt for having dealt in printed matter purporting to be extracts from works of Roman Catholic divines and casuists on the subject of the confessional. A conviction of misdemeanor having been had before a police magistrate the case came on review to the Common Pleas. The appellant's counsel asked: "What effectual remedy is there in the hands of persons wishing to suppress a system which they conceive to be pernicious, except to expose the tendency of such a system?" To this BOVILL, C. J.,

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answered: "There is no doubt that all matters of importance to society may be made the subject of full and free discussion, but while the liberty of such discussion is preserved, it must not be allowed to run into obscenity and to be conducted in a manner which tends to corrupt the public morals. The probable effect of the publication of this book being prejudicial to public morality and decency, the appellant must be taken to have intended the natural consequences of such publication, even though the book were published with the object referred to by counsel. \* \* \* Discussions offensive to public decency and of a depraving tendency are not privileged."

In *United States v. Bennett* (16 Blatchford, 338), Judge BLATCHFORD refers with approval to the language of Judge CLARK in charging the jury in the *Haywood* case as follows: "*A book is indecent which is unbecoming, immodest, unfit to be seen.* A book which is obscene, as I have said to you before, or lewd, or lascivious, or indecent, in whole or in part, or in its general scope or tendency, in its plates or pictures, or in its reading matter, falls within the scope of the prohibition of the statute."

Judge DANIELS, in *People v. Muller* (32 Hun, 209), says: "The statute has not particularly described what, within its intent and purpose, should be considered obscene or indecent. But as these words are words of well known significance, it must have been intended by the legislature, in the enactment of this law, to use them in their popular sense and understanding. \* \* \* And as the statute has given this general definition of the character of the acts constituting the offense, it must necessarily have been designed that the drawing, picture, photograph or writing should be exhibited to and observed by the jury for them to determine as a matter of fact, in the exercise of their good sense and judgment, whether or not they were obscene and indecent. \* \* \* The question in all of these cases must be, what is the impression produced upon the minds by perusing or observing the writing or picture referred to in the indictment, and one person is as competent to determine that as another."

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The only question presented by the demurrer in this case is whether the writing in question is, as matter of law, *not* indecent. In all the cases where the question has arisen it was held that the writing or picture must be submitted to the jury to decide whether in fact it was indecent or not; that the words used in the statute are in themselves descriptive, to be taken and understood in the popular sense and that upon such a question the opinion of one person is just as good as that of another. This court is asked to hold, as matter of law, that the writing, upon reading and inspection, is not an indecent publication. That, as it seems to me, is a question of fact which must be determined by the jury, under proper instructions. The character of the writing, its tendency and effect, is a question that one person is as competent to decide as another, and hence it cannot be said, as matter of law, that it is not within the prohibition of the statute.

In *United States v. Bebout* (28 Fed. Rep. 522) the defendant was indicted under a Federal statute against "publications of an indecent character." The trial judge in charging the jury defined the term "indecent" as something "not decent; unfit to be seen or heard." He then said: "There is a test which has often been applied and approved of by the courts in this class of cases to determine whether the publication is obscene or indecent within the meaning of the statute before referred to. It is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall. Under these definitions, whether the matter set out in the indictment was obscene or indecent, is a question of fact for you to determine."

I am, therefore, unable to concur in the views of the majority. It is true that my brethren have considered it necessary to denounce the publication in question upon almost every conceivable ground of impropriety, except the ground which presents the only question before the court, that it is an indecent publication within the statute. The paper has been characterized by very harsh names that do not, in the

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least, solve the only question presented by the appeal. Having arrived at the conclusion that it is not an indecent publication, it is of very little consequence what else it may be. The important feature of the case is that, notwithstanding the conceded iniquity found in the writing, the defendant, by what appears to me to be a very strained and artificial construction of his act, is allowed to escape punishment; nor is the situation helped very much by the suggestion that the paper is a criminal libel and that the public prosecutor should have indicted the defendant for that crime instead of the one charged in the indictment. The defendant is not injured very much by the suggestion that he has published a libel instead of an indecent paper; since we all know that he may now be protected by the Statute of Limitations from any prosecution on such a charge.

The judgment should be reversed and the demurrer overruled.

EDWARD T. BARTLETT, VANN, HISCOCK and CHASE, JJ., concur with per curiam opinion, and CULLEN, Ch. J.; HAIGHT, J., concurs with O'BRIEN, J.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES HOEFLER, Appellant, v. MATTHEW J. CAHILL, as Coroner of the Borough of Richmond in the City of New York, Respondent.

1. NEW YORK (CITY OF) — CIVIL SERVICE LAW — WHEN CLERK REMOVED FROM POSITION IN OFFICE OF CORONER OF BOROUGH OF RICHMOND ENTITLED TO MANDAMUS DIRECTING HIS RE-INSTAMENT. Where a member of a disbanded volunteer fire department in the county of Richmond was appointed as a clerk in the office of the coroner of the borough of Richmond under the authority of section 1571 of the Greater New York charter, which provides that "The coroners in each borough shall have an office in said borough and shall appoint a clerk who shall receive an annual salary to be fixed by the board of estimate and apportionment and the board of aldermen, and such and so many assistant clerks as shall be provided for in the annual budget. They shall also appoint a stenographer in each borough," etc., such clerk was not appointed to and did not hold

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a public office, but held a clerical and subordinate position without original, independent or governmental duties, and having been removed and dismissed from such position without any hearing whatever, as required by the Civil Service Law (L. 1899, ch. 370, § 21, as amd. by L. 1904, ch. 697), he is entitled, in the absence of evidence that he held "the position of private secretary, cashier or deputy of any official or department," which positions are excepted from the requirements of the latter statute, to a peremptory writ of mandamus requiring the coroner of the borough of Richmond to reinstate him in the position from which he was removed and he is not compelled to resort to an action of quo warranto.

**2. SAME—WHEN FACT, THAT STATUTE AUTHORIZING APPOINTMENT OF SUCH CLERK PRESCRIBES NO DEFINITE TERM, DOES NOT AUTHORIZE HIS REMOVAL AT PLEASURE OF CORONER.** The fact that the statute, under which the relator was appointed, prescribed no definite term of office, did not render his term of office subject to the pleasure of his superior so that he could be removed at any time; while the statute does not fix the term of appointment, it must be construed with reference to the Civil Service Law, which also applies and prohibits the removal of the relator except under the conditions therein specified.

**3. SAME—WHEN EVIDENCE TENDING TO SHOW THAT SUCH CLERK HELD THE OFFICE, OR PERFORMED THE DUTIES, OF A PRIVATE SECRETARY, CASHIER OR DEPUTY, PROPERLY EXCLUDED.** Where the defendant, upon the hearing of the proceedings for the writ of mandamus, offered evidence intended to show that the duties discharged by the successor of relator were those of deputy, cashier or private secretary, and that, therefore, the position came within the exceptions of section 21 of the Civil Service Law, such evidence was incompetent and properly excluded for the reason, amongst others, that, when the statute excepted from the limitations upon the power to remove certain persons like relator the office of deputy, cashier or private secretary, it contemplated only positions brought within these excepted classes by the terms of the laws which created or authorized and defined them, or at the most positions which under some sufficient authority at the discretion of the appointing or superior power have been invested with the duties and character of one of the excepted positions. It was not the purpose to allow the head of a department at will by assigning temporarily certain duties to a position created as an ordinary clerkship, to transform it into the office of private secretary, cashier or deputy and thus secure the power of removal, free from the restrictions imposed by the statute.

*People ex rel. Hoeffle v. Cahill*, 116 App. Div. 885, reversed.

(Argued April 1, 1907; decided May 21, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 25, 1907, which reversed an order of Special Term

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granting a motion for a peremptory writ of mandamus to compel the defendant to reinstate the relator in the position of clerk to the coroner of the borough of Richmond and dismissed the proceeding.

The facts, so far as material, are stated in the opinion.

*George M. Pinney, Jr., and Warren C. Van Slyke* for appellant. Mandamus was the sole and only remedy of the relator and all necessary parties were before the court. (*Rowland v. Mayor, etc.*, 83 N. Y. 376; *People ex rel. Corkhill v. McAdoo*, 98 App. Div. 312; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495; *People ex rel. Coveney v. Kearny*, 44 App. Div. 449; *People ex rel. Shaughnessy v. Fornes*, 172 N. Y. 323; *O'Hara v. City of New York*, 46 App. Div. 518; 167 N. Y. 567; *Martin v. City of New York*, 82 App. Div. 35; *People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59; *People ex rel. Tate v. Dalton*, 34 App. Div. 6; *People ex rel. Drake v. Sutton*, 88 Hun, 173.) There were no errors in the rulings of the trial court. (L. 1901, ch. 466, § 1751.)

*William B. Ellison, Corporation Counsel (James D. Bell of counsel)*, for respondent. The relator held an office defined by statute, and the title to it can only be determined in an action in the nature of quo warranto. (*People ex rel. O'Toole v. Hamilton*, 98 App. Div. 59; *People ex rel. McLaughlin v. Police Comrs.*, 174 N. Y. 450; *People ex rel. Blatchford v. McAdoo*, 101 App. Div. 183; 181 N. Y. 547; *People ex rel. O'Keefe v. McFadden*, 75 App. Div. 264; *People ex rel. Corkill v. McAdoo*, 113 App. Div. 770; *People ex rel. Hillman v. Scholer*, 94 App. Div. 282; *Ramsey v. Hayes*, 187 N. Y. 367; *People ex rel. Cochrane v. Tracy*, 35 App. Div. 265.) The duration of relator's office, not having been declared by law, it was held during the pleasure of the coroner. (*People ex rel. Cline v. Robb*, 126 N. Y. 180; *Bergen v. Powell*, 94 N. Y. 591; *People ex rel. Earl v. England*, 16 App. Div. 97.)

HISCOCK, J. Section 1571 of the Greater New York charter, amongst other things, provides as follows: "The coroners

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in each borough shall have an office in said borough and shall appoint a clerk who shall receive an annual salary to be fixed by the board of estimate and apportionment and the board of aldermen, and such and so many assistant clerks as shall be provided for in the annual budget. They shall also appoint a stenographer in each borough," etc.

Under and in accordance with the terms of this provision the relator was appointed and entered upon the discharge of his duties as clerk to the coroner of the borough of Richmond. Concededly he was a member of a volunteer fire department in the county of Richmond at the time of its disbandment on November 1st, 1905, and as such came within the provisions of section 21 of the Civil Service Law (Chap. 370 of the Laws of 1899, as amended), which, amongst other things, enacted that "No person holding a position by appointment or employment in the State of New York \* \* \* who shall have served the term required by law in the volunteer fire department of any city, town or village in the State, or who shall have been a member thereof at the time of the disbandment of such volunteer fire department shall be removed from such position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges. \* \* \* Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department." (L. 1904, chap. 697.)

There was no evidence that relator held "the position of private secretary, cashier or deputy," and, therefore, came within the exceptions to the limitation upon the right of removal expressed in the section as above quoted.

Thereafter concededly he was removed and dismissed from his position without any hearing whatever. Save for one reason hereinafter to be referred to it is undisputed that upon the record as now presented the relator was entitled to a writ of mandamus compelling his reinstatement, if the place to which he had been appointed, and from which he was removed, was a clerical or subordinate position as distinguished from a public office. The learned Appellate Division,

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in reversing the order made by the Special Term granting the writ, reached the conclusion that he had been appointed to and was holding an "office," and that, therefore, he could not secure relief by a writ of mandamus but must resort to an action of quo warranto directed against the occupant appointed after his removal.

We think that the court took an erroneous view of the nature of relator's position, and that most clearly the latter was not an office as defined by the law in connection with such a proceeding as this.

The statute under which relator was appointed furnishes the test by which to determine this question. Such statute first directs attention to the coroner as the head of the department of government under consideration. It then provides that he "shall appoint a clerk \* \* \* and such and so many assistant clerks as shall be provided for \* \* \* also appoint a stenographer." This statute does not assign any original, independent or governmental duties to the position of clerk thus created any more than it does to that of assistant clerk or stenographer. Its plain meaning as a whole is that the coroner charged with various statutory duties and responsibilities shall have the power to appoint a clerical force which, under his direction and subject to his orders and control, shall assist him in the administration of the duties of his office by performing such routine and subordinate duties as may be assigned to them. There is entirely lacking any suggestion of those powers and responsibilities and of that independent action upon the part of one of these clerks which are inevitably incidental to a public office.

We think that what was said in the case of *People ex rel. Corkhill v. McAdoo* (98 App. Div. 312) with reference to the position of complaint clerk in the police department is entirely applicable. The court there said: "We are of opinion, however, that the position held by the relator, and which is not prescribed by the statute, is that of a regular clerk, whose duties relate, not to the public, but to the police commissioner, who is charged with the discharge of the duties of

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the office, and who is authorized ‘to appoint and remove \* \* \* such clerks \* \* \* and other subordinates, assistants and employees as may be reasonably necessary to the proper performance of the duties and execution of the powers and functions of the police department created by this act, or of any of the component parts thereof, and to prescribe their respective ranks and duties.’ \* \* \* It is clear, we think, that the relator, appointed under this authority to aid and assist the police commissioner in the discharge of the duties which he owes to the public, is not a public officer. (Citations.) The essential element in a public office is that the duties to be performed shall involve the exercise of some portion of the sovereign power, whether great or small. (23 Am. & Eng. Ency. of Law [2d ed.], 322, and authorities cited in the notes; *Attorney-General v. Drohan*, 169 Mass. 534, 535), and it can hardly be contended that a clerk, performing routine duties in strict subordination to a public officer, and with no authority under the statute to do anything except where it is authorized and directed by such officer, is exercising any of the sovereign powers. He is merely doing the detail work of the officer who is exercising the sovereign powers delegated to him by law, and under the authorities cited last above the relator is not a public officer.” (See, also, *People ex rel. Coveney v. Kearny*, 44 App. Div. 449; *People ex rel. Jacobus v. Van Wyck*, 157 N. Y. 495, 504, 506.)

We do not think that the authorities cited by the learned Appellate Division as supporting their conclusions do justly bear that construction.

In *O'Hara v. City of New York* (46 App. Div. 518) the plaintiff was seeking to recover the salary attached to a position from which he had been improperly removed, and the substantial question under consideration was whether he had been a mere employee who could not recover compensation for a period when he did not actually render services or whether he had been appointed to and was entitled to a regular office or position under the municipal government at a fixed

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salary so that he could recover the amount of his salary although in fact he performed no services, being prevented from so doing by a superior officer who attempted to remove him in violation of the law. Thus the court was engaged in distinguishing between a mere employment terminable at will and an appointment to a regular and permanent position with a fixed salary and from which the incumbent could not be removed except under certain conditions. In our opinion the question was not at all presented and considered whether the plaintiff had been appointed to a clerical position or to a public office as those terms are now presented to us for consideration and definition. In fact the contrary would appear to be the case, because O'Hara had been reinstated to the position of which he was seeking to recover the salary by mandamus proceedings which concededly would not lie in the case of a public office.

The case of *Martin v. City of New York* (82 App. Div. 35) makes even plainer the features distinguishing the cases relied upon by the Appellate Division from this one, because there the court says: "The plaintiff was not a mere employee of the city performing services under a contract of employment like a teacher in a public school, \* \* \* but he rather held a particular office or position in the public service by appointment," thus showing that the court was not considering at all the difference between a public office and a mere clerkship or position such as is involved in this case. It appeared there also that the plaintiff had been restored to the position from which he had been unlawfully removed by mandamus proceedings.

The case of *People ex rel. McLaughlin v. Police Commissioners of Yonkers* (174 N. Y. 450) involved an application for a peremptory writ of mandamus to compel the defendants to reinstate the relator as a captain in the police force of the city of Yonkers. The court did not enter upon the consideration of the question whether the place to which the relator was seeking reinstatement was a subordinate position as distinguished from an office, but the discussion proceeded throughout upon

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the assumption and theory that a police captaincy was an office, and that another incumbent having been appointed thereto, relator could only establish his rights, if any, in an action of quo warranto.

The other reason before referred to which is briefly urged in opposition to relator's proceeding is in substance that he having been appointed to his position of clerk under a statute which prescribed no definite term of office held subject to the pleasure of his superior and could be removed at any time. We think that this contention is unfounded. While the statute giving the coroner the right to appoint a clerk did not fix the term of office, still that statute must be construed with reference to others, and the Civil Service Law, to which we have already referred, and the applicability of which is not questioned, prohibited the removal of the relator except under the conditions there specified.

Finally, it is contended that certain errors were committed upon the hearing at Special Term which required reversal of the order there made, and our attention is directed to the following questions, objections and rulings:

(By defendant's counsel) : "Describe briefly the duties of the position held by Hoefle ? [Objected to.] The Court: He was a clerk; he was not a deputy; he had no right to sign the Coroner's name to anything. Mr. Hughes: Does your Honor exclude the question ? The Court: Yes. [Exception.] Mr. Pinney (relator's counsel): I withdraw the objection if your Honor please. I don't want any exception in this record. (By defendant's counsel): Q. What are the duties of the successor of Hoefle ? [Objected to.] Q. Specify the nature of his successor's work in the coroner's office ? [Objected to as incompetent, immaterial, irrelevant and not binding upon this relator who was appointed by another coroner, and because in no event has this coroner any power under section 1571 of the Charter of the city of New York to impose any other than clerical duties. Objection sustained; exception.] \* \* \* Q. In your absence from the office who represents you ? [Objected to because he cannot under

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the law have any representative who may act as his deputy. Objection sustained; exception.] ”

It is now said in substance that it was the purpose by this examination to demonstrate that the position formerly held by relator was that of deputy, cashier or private secretary and that, therefore, he came within the exceptions of section 21 of the Civil Service Law and was removable without institution of the proceedings otherwise prescribed by that section in the case of a volunteer fireman.

There was no exclusion of any competent evidence in regard to the duties performed by relator. It is not apparent that the defendant who took office sometime after relator's removal had any knowledge of the duties performed by him. Moreover the objection originally interposed to the question asked of defendant was subsequently withdrawn and an opportunity afforded for examination which was not improved, and thus the evidence upon this point was confined to the testimony given by the relator himself, which clearly indicated that he was not discharging the duties of any of the excepted positions.

We think that the questions asked of defendant with reference to the duties performed by relator's successor were also properly excluded. It well might be argued that relator was entitled to have the legality of his removal tested by conditions as they existed at the time it occurred and that if he was not then performing the duties of one of the positions excepted from the force of section 21, his reinstatement could not be defeated by showing that subsequently the duties of one of such positions were being discharged by the person appointed in his place. But in our opinion there is another answer than this. We think that when the statute excepted from the limitations upon the power to remove certain persons like relator the office of deputy, cashier or private secretary, it contemplates only positions brought within these excepted classes by the terms of the laws which created or authorized and defined them, or at the most positions which under some sufficient authority at the discretion of the appointing or superior

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power have been invested with the duties and character of one of the excepted positions. We do not believe that it was the purpose to allow the head of a department at will by assigning temporarily certain duties to a position created as an ordinary clerkship, to transform it into the office of private secretary, cashier or deputy and thus secure freedom of removal for the purpose of defeating such an application as this. This view is sustained by other provisions of the Civil Service Law such as are found in section 12, relating to the exempt class, which refer to and distinguish the different positions of clerk, secretary and deputy and speak of them as "authorized by law," rebutting any inference that an official at will might create a secretaryship, for instance, from a clerkship through assignment to the latter of certain duties. The intent to make definite and to restrict rather than to enlarge the scope of the exceptions to the limitations upon the power of removal may be found from the fact that the statute originally excepted not only the position of private secretary or deputy, but also that of "any other person holding a strictly confidential relation to the appointing officer." It is quite manifest that the limitations upon the power to remove veterans and others would cease to be very efficacious if every official and head of a department might avoid them by changing clerks into officials and employees of a character placed beyond the protection of these limitations.

It is briefly suggested in a somewhat incidental manner upon the brief of the counsel for the appellant that the position held by the relator is in the exempt class under the civil service regulations. We cannot find that any such issue, of whatever importance it might be, was raised by the return or considered in the courts below.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs to the relator in both courts.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur.

Order reversed, etc.

MARY LIGHTON, Respondent, *v.* THE CITY OF SYRACUSE,  
Appellant.

**CONTRACT—CONDITIONAL UPON ACTION BY THE LEGISLATURE—SPECIFIC PERFORMANCE.** A contract for the purchase of real estate executed by the city of Syracuse in conformity with a resolution adopted by the common council, providing for the payment of a portion of the purchase price on a date specified, "the balance to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1, 1900," cannot be specifically enforced and the city compelled to accept the deed where no payment was ever made upon the contract, and no act authorizing the payment by the city of the purchase price or any part thereof has been passed by the legislature, since the provision for payment is not absolute, but conditional, depending upon future action by the legislature, and such action must be regarded as a condition precedent to any obligation on the part of the city.

*Lighton v. City of Syracuse*, 112 App. Div. 589, reversed.

(Argued May 1, 1907; decided May 28, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 22, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Walter W. Magee, Corporation Counsel (Charles V. Byrne of counsel), for appellant. The court had no power to decree specific performance of the contract, because the municipality had never made any appropriation to meet the obligations thereof; and never had any fund out of which payment could be legally made; and consequently, under the express provisions of the city's charter, the contract cannot be specifically enforced. (*Smith v. City of Newburgh*, 77 N. Y. 136; *Wells v. Town of Salina*, 119 N. Y. 280; *A. R. M. Co. v. Town of Bridgewater*, 185 N. Y. 1; *Duschnes v. Heyman*, 2 App. Div. 354; 158 N. Y. 735; *Brumme v. Herod*, 38

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App. Div. 558; *Cartledge v. West*, 2 Den. 377; *People ex rel. Cooke v. Wood*, 71 N. Y. 371; *Callahan v. Mayor, etc.*, 6 Daly, 230; *Nelson v. Mayor, etc.*, 63 N. Y. 538; *People ex rel. Schenck v. Green*, 64 N. Y. 499.) The contract in question is illegal and cannot be enforced. (L. 1895, ch. 822, § 19; *Ziegler v. Chapin*, 126 N. Y. 343.)

*Walter Welch and James E. Newell* for respondent. The judgment in the mandamus proceeding to compel the mayor and the city clerk to execute the contract for the purchase of the plaintiff's real estate conclusively determined that said contract was in proper form and duly authorized and duly executed by the plaintiff, and that it was the duty of the said mayor and city clerk to execute the same on behalf of the defendant herein, and that said contract was free from fraud, was in all respects valid and that the common council of the defendant had authority to purchase said real estate in the manner provided and to direct said contract to be made, and the defendant herein is estopped by said judgment in the mandamus proceeding from raising any of said issues in this action. (*Ashton v. City of Rochester*, 133 N. Y. 187; *Castle v. Noyes*, 14 N. Y. 329; *N. P. Bank v. Whitman*, 7 N. Y. S. R. 456; *Matter of B. W. & N. R. R. Co.*, 19 Hun, 314; 81 N. Y. 69; *Carleton v. Lombard*, 149 N. Y. 137; *People ex rel. McCabe v. Matthias*, 179 N. Y. 242; *Culross v. Gibbons*, 130 N. Y. 447; *U. S. v. City of New Orleans*, 98 U. S. 381; *Ralls County Court v. U. S.*, 105 U. S. 733; *Weston v. City of Syracuse*, 17 N. Y. 110.) The contract for the purchase of the plaintiff's real estate is valid and was not dependent for its validity upon the passage of any legislative act. Independent of the conclusive effect of the judgment in the mandamus proceeding it is submitted that the passage of an act by the legislature in the year 1900 was not a condition precedent to the contract but was intended to affect simply the time and method of payment. (*De Wolf v. French*, 51 Me. 420; *Nunez v. Dontel*, 86 U. S. 161; *Lee v. Decker*, 6 Abb. Pr. [N. S.] 392; *Sears v. Wright*, 24 Me. 278; *Crocker v.*

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*Holmes*, 65 Me. 195; *Capron v. Capron*, 44 Vt. 410; *Cota v. Buck*, 7 Metc. 588; *Randall v. Johnson*, 59 Miss. 317; *Upson v. Holmes*, 51 Conn. 500; *Genet v. D. & H. C. Co.*, 96 N. Y. Supp. 406.)

VANN, J. This action was brought to compel the city of Syracuse to specifically perform a contract for the purchase of land from the plaintiffs. The contract had a peculiar origin. On the 27th of November, 1899, the common council adopted the following resolution: “*Resolved*, that the mayor and clerk be and they hereby are authorized and directed to enter into contract with Mary Lighton and Martha T. Lighton for the purchase of the real estate situate on the southwest corner of East Water street and Montgomery street; the same being twenty-five feet front on East Water street, the same in rear, and seventy-five feet front on Montgomery street; at the sum of \$21,000, free and clear of all incumbrances; five thousand dollars to be paid over before January 12th, 1900; the title of which to be approved of by the corporation counsel, and the same to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1st, 1900, and for that purpose the senator and members of assembly of Onondaga county are requested to procure the passage of such an act.” There were thirteen votes in favor of said resolution and two against it, four of the aldermen being absent. On the 26th of December, 1899, Mayor McGuire returned said resolution without his approval, but on the same day the common council readopted it notwithstanding the objections of the mayor, fifteen aldermen voting therefor and three voting against it, with one absentee.

This action was taken by the common council under the revised charter of the city which was then in force and only five days before the White charter, which became a law in 1898, was to go into effect and a new common council was to assume control. (L. 1895, ch. 822; L. 1898, ch. 182.) The contingent fund, which alone was available for the purchase

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of land by the city, was overdrawn to the extent of \$137,569.90 when said resolution was adopted and according to the revised charter every alderman voting to contract a debt when there was no fund available to pay it was not only liable to a penalty but was also liable for the debt itself, while the city was expressly exempted from all liability therefor. (L. 1895, ch. 822, § 229; L. 1901, ch. 402.)

On the 6th of February, 1900, the plaintiffs signed and acknowledged a proposed contract, purporting to be drawn pursuant to the terms of said resolution, with a covenant on the part of the city to purchase the premises for the sum of \$21,000 and to pay for the same as follows: "Five thousand dollars to be paid over before January 12th, 1900; the balance to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1st, 1900." The mayor and clerk refused to sign this contract in behalf of the city, and the plaintiffs, as relators, commenced a proceeding in the Supreme Court to compel them to execute and deliver it. After some delay caused by the dismissal of the first proceeding an alternative writ of mandamus was issued commanding the mayor and clerk to execute the contract or show cause why the command of the writ should not be obeyed, and that they make return within twenty days. A return was made accordingly setting forth various reasons why a peremptory writ of mandamus should not be issued, such as fraud, excessive price and the like, but not including the conditional nature of the contract. The matter was referred to a referee, who decided that a peremptory writ should be issued, and on the 25th of April, 1903, the Special Term confirmed substantially all the findings made by the referee and issued the writ accordingly, addressed to Mayor Kline, who had in the meantime succeeded Mayor McGuire, as well as to the new city clerk. No appeal was taken from said order, and, acting under the compulsion of the writ, the mayor and clerk, on the 10th of November, 1903, signed, acknowledged and delivered the proposed contract in behalf of the city. After

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demand made in due form upon the mayor, comptroller and city treasurer that the defendant accept the deed and pay the entire purchase price, this action was commenced on the 17th of November, 1903, to compel the city to specifically perform. No payment was ever made upon the contract, and no act authorizing the payment by the city of the \$21,000 or any part thereof was ever passed by the legislature, and this fact, together with the absence of any fund to pay for said land, was pleaded as a defense to the action. Various other defenses were also pleaded, but in view of the conclusion we have reached it is unnecessary to mention them.

Upon the trial of the action at Special Term the court after finding the foregoing facts, among others, decided that the plaintiffs were entitled to judgment requiring the defendant and its officers to forthwith perform the contract. The Appellate Division unanimously affirmed the judgment entered accordingly and the defendant appealed to this court.

The primary question is whether, according to the facts found by the trial court, the city is under a legal obligation to pay the plaintiffs the sum of \$21,000 and accept the deed tendered? This depends upon the subordinate question whether the contract to purchase was absolute or conditional. Assuming that the contract provided for the absolute payment of \$5,000, even if the resolution did not, what is to be said as to the payment of the balance? Both the contract and the resolution upon which it was founded provided that at least the balance of \$16,000 should be "paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1st, 1900." This provision for payment, as we read it, is not absolute but conditional. The city did not covenant to pay the balance absolutely and in any event, but to pay it in case the legislature should so provide and it never made any provision on the subject. The contract was executory and necessarily related to the future, but legislative action was to precede performance by the city and was the condition upon which it promised to pay. That condition was precedent in time and nature to any obli-

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gation on the part of the city, which was not bound when the contract was made, but was to be bound by the happening of the condition prescribed. Until then the promise was not absolute, but contingent, and it could become absolute only when the legislature acted. The resolution of the common council bound the city to perform when a special law should be passed, and until it should be passed the promise was conditional, and unless it should be passed the promise could never become effective. The condition required action by the legislature before the money could become due, and the legislature never acted. "If in fixing upon the happening of a future contingent event as the time when money is to be paid the parties intend to make the debt a contingent one and the event never happens, the creditor's right to recover will never accrue." (*De Wolfe v. French*, 51 Me. 420, 421.) The passage of a special act was not fixed upon with reference to mere convenience in making payment, but as the event which was to determine whether payment was ever to be made or not. Clearly the condition was not subsequent, for non-performance did not operate to defeat an absolute promise to pay, but performance of the condition was the fact upon which the contingent promise to pay was to become absolute. It was not a promise to pay *unless* something was done, but a promise to pay *if* something was done.

This case in principle is not unlike one recently decided by us in which the defendant agreed to convey land to the plaintiff upon condition that the former should "receive the title to" the premises then involved "on or before the first of October, 1902." It was held that the condition was precedent and as the defendant, acting in good faith, did not get the title on or before the day named, although he did after an action to compel him to specifically perform had been commenced, he was under no obligation to perform. (*Baldwin v. McGrath*, 90 App. Div. 199; 113 App. Div. 902; 188 N. Y. 606, decided April 30, 1907; see, also, *Duschnes v. Heyman*, 2 App. Div. 354; 158 N. Y. 735; *Cartledge v. West*, 2 Den. 377.)

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Even if we disregard the limitation to legislation during the session of 1900 as unimportant, provided the legislature had conferred the requisite authority at any time before this action was commenced, what obligation was the city under to make the payment unless authority was conferred at some time? The authority to be obtained in the future was the measure of the obligation of the city. Its covenant was a promise to pay when authorized by the legislature, that is, upon condition that the legislature should give the authority required. The city, being the mere creature of the legislature, could not compel its creator to confer the authority and there is neither finding nor evidence that any officer of the defendant ever tried to prevent the passage of such an act as the contract contemplates. The city had no power under the White charter to raise the money required to complete the purchase by taxation during the year 1900, or any year since (§§ 96, 97, 149), but even assuming that it had, neither the contract nor the law required it to do so. "Where a way of payment is prescribed by contract or by statute, that way must be strictly pursued." (*Swift v. Mayor, etc., of N. Y.*, 83 N. Y. 528; *People ex rel. Ready v. Mayor, etc., of Syracuse*, 144 N. Y. 63.)

The agreement to pay was made under the revised charter and only upon the condition that the city should receive special authority from the legislature to pay and that authority has never been conferred. When the plaintiffs come into court asking for specific performance of the contract they can require performance only according to its terms and one of the terms is that the authority of the legislature should be given by a special act, passed for that particular purpose. The contract has no more binding force and has no different meaning because it was executed under the constraint of a writ of mandamus than if it had been executed voluntarily and without any interference by the court. Its intent in the one case, the same as in the other, must be ascertained from the language used by the parties, in view of the surrounding circumstances, and that language cannot be enlarged or cut.

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down to suit the convenience or promote the interest of either party. A municipal corporation has much less power in contracting than an individual, but even if an individual purchases land upon condition, that condition is as much a part of the contract as any other stipulation appearing therein and unless the condition is waived it must be performed or the obligation to purchase does not mature. Here the condition was not within the control of either party, as both parties knew when they assented to it. They could not have intended that the contract should be specifically performed unless the proposed act should be passed, for that was the form of the promise and a promise in any other form would have been illegal, as will be shown hereafter. The plaintiffs knew that the legislature might or might not in its sound discretion give the authority required and that otherwise the covenant of the defendant rested upon an unexecuted condition. That condition is an obstacle to performance on the part of the city that has not been overcome.

The contract was really made when the common council passed the resolution over the veto of the mayor. The date when the formal writing was signed by the mayor and clerk and the circumstances under which it was signed are important only as evidence of a waiver on the part of the city of the stipulation that the proposed act should be passed during the particular session named. In view of the refusal by the mayor and clerk to sign the contract for two or three years until commanded by the court to do so, the exact date of action by the legislature might be immaterial, but action before suit brought for specific performance was necessary if the contract was to be performed according to its terms. (Pomeroy on Contracts [2nd ed.], § 319; Waterman on Specific Performance of Contracts, § 434.)

As the contract rests wholly upon the resolution adopted by the common council, the provisions of the revised charter which were then in force are alone to be regarded in testing its intent and meaning. According to that charter the resolution would have been absolutely illegal in view of the situation

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of the contingent fund if passed in any other form than that adopted. It would not only have been illegal, but every alderman who voted for it would have been subject to a heavy penalty, while the city would have been free from any liability whatever. (Revised charter, § 229.) The aldermen, with a clear appreciation of the situation, prudently took action which did not purport to be binding according to the law then in force, but which would be binding only upon the condition that another law should be passed. The plaintiffs are presumed to have known that the contract would conclude neither the city nor themselves unless authorized by the legislature. "A person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done no subsequent act can make the contract effective." (*Smith v. City of Newburgh*, 77 N. Y. 130, 136.) The intention of the common council, if at all doubtful according to the language of the resolution, is made clear by the state of the law when the aldermen took action, for unless the contract was subject to a condition precedent they were not binding the city but themselves.

The mandamus proceeding was conclusive only as to what had been done before the contract was formally executed pursuant to the command of the court. (*Ashton v. City of Rochester*, 133 N. Y. 187.) We assume that the court in issuing the mandamus impliedly decided that the resolution of the common council, in the form adopted, was valid, and we confirm the decision; but neither the learned justice who signed the peremptory writ nor ourselves could so hold without construing the resolution and the contract to be subject to the condition named therein. Without that condition the contract would be void. With that condition the contract is valid, but it cannot be specifically performed because the condition has not been fulfilled. That condition depended for fulfillment upon an independent body, exercising the highest sovereign power, entirely free from the control of either party to the action. It is doubtless true, as the court found, that the city made no further effort to procure the requisite legis-

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lation, but what more should it have done than to make the request of the senator and assemblymen which is embraced in the resolution itself? The city did not agree to do anything further and it was not bound to do anything further. The contingent nature of the contract was not involved in the mandamus proceeding because the contingency had not been resolved and the time for payment had not come around when that matter was decided. The court then held that the contract was valid and should be signed. That is all it could decide. Whether it could be specifically performed was not involved, as that question depended upon action by the legislature, which might or might not be taken. If taken before suit, the court could decree performance, but not otherwise, and, hence, the obligation to perform and the power to compel performance depended upon what might happen after the signing of the contract. (*People ex rel. Schanck v. Green*, 64 N. Y. 499, 506.)

Reliance is placed by the respondents upon an old case which arose long before the revised charter went into effect. (*Weston v. City of Syracuse*, 17 N. Y. 110.) Even if that case would apply provided the revised charter had continued in force during the political year succeeding that in which the resolution was passed, it clearly has no application under existing circumstances, because five days after the resolution was finally adopted the revised charter went out of existence and the White charter went into effect. The administration in office under the old law could not contract a debt of the kind in question which the new administration under the new law was bound to pay, unless assets were left to pay it, which was not the case. Any other construction would sanction acts that might defeat the new theory of municipal government which it was the object of the White charter to put into force.

We think that the contract under consideration is governed by a condition precedent, under the control of neither party, which has not been fulfilled and that the parties when they assented to it, knew that specific performance would be impossible unless that condition was complied with.

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Statement of case.

The judgment should be reversed, and, as the controlling facts cannot be changed, the complaint should be dismissed, with costs in all courts.

CULLEN, Ch. J., GRAY, WERNER, WILLARD BARTLETT and CHASE, JJ., concur; O'BRIEN, J., concurs in result.

Judgment reversed, etc.

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JOHN A. CAMPBELL et al., Appellants, v. JAMES Emslie,  
Respondent.

1. **APPEAL—COSTS—EXTRA ALLOWANCE.** Where there is no dispute about the facts, the question whether a case is so difficult and extraordinary as to justify an extra allowance is a question of law reviewable by the Court of Appeals upon an appeal from the judgment.

2. **SAME.** An extra allowance is improperly granted in an action upon contract for the recovery of money only, to which a counterclaim was interposed, where the case was disposed of by stipulation in a manner favorable to both parties, by reason of a former judgment rendered in another state upon the same cause of action between the same parties, and they, therefore, in effect, settled the controversy without trial.

*Campbell v. Emslie*, 118 App. Div. 905, modified.

(Argued May 6, 1907; decided May 28, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 31, 1906, which affirmed a judgment in favor of defendant entered upon a dismissal of the complaint by stipulation and an order of Special Term granting an extra allowance.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Franklin Pierce and Arthur J. Baldwin* for appellants. Before a Special Term, upon an application for an extra allowance, reaches the point of exercising its discretion as to the amount of an allowance, it must determine a question of law, namely, that the case is "a difficult and extraordinary case," and that determination involves a question of law, and the court, at Special Term, had no power in this case to grant an extra allowance, as the case was not difficult and extraordi-

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nary, and from the judgment in the Appellate Division an appeal can be entertained in this court. (*H. F. Ins. Co. v. G. F. Ins. Co.*, 138 N. Y. 252; *S. T. Co. v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 407; *Coppet v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 606; *Conaughty v. S. Co. Bank*, 92 N. Y. 401; *Kitching v. Brown*, 180 N. Y. 429; *Bostwick v. Menck*, 40 N. Y. 390; *Penfield v. James*, 56 N. Y. 659; *Fish v. Koster*, 28 Hun, 64; 92 N. Y. 627; *Wright v. Fleischman*, 99 App. Div. 549; *Stoddard v. Clarke*, 9 Abb. [N. S.] 312.) The case is not difficult and extraordinary. It is the simplest kind of a simple case, namely, for money due upon a written contract. (*Frey v. N. Y. C. & H. R. R. Co.*, 114 App. Div. 625; *Angier v. Hager*, 51 App. Div. 171; *Brown v. R. M. Co.*, 109 App. Div. 150; *Gillespie v. Bill-brow*, 15 App. Div. 212; *Wright v. Fulling*, 104 App. Div. 49; *Hinman v. Ryder*, 12 J. & S. 330; *Penfield v. James*, 56 N. Y. 659; *S. T. Co. v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 407; *De Coppet v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 605; *Freemont v. B. & M. R. R. Co.*, 111 App. Div. 83; *Walker v. N. F. P. Co.*, 111 App. Div. 19.) Section 739 of the Code of Civil Procedure is the only section of the Code which provides for an offer of judgment in a case like the present, but it does not provide for such an offer of judgment as the one in this case. There is no statute which does provide for such an offer, and the offer of judgment in this case is no more or less than an agreement of settlement, and under section 3260 of the Code of Civil Procedure it is expressly provided that in such a settlement no greater sum shall be demanded as costs than at the rates prescribed by section 3251 of the Code of Civil Procedure. (*Hinman v. Ryder*, 12 J. & S. 330; *Hubber v. Clark*, 105 App. Div. 127; *Commercial Bank v. Hand*, 27 App. Div. 145; *Dates v. F. B. W. Co.*, 50 App. Div. 38; *Cripping v. Hermance*, 9 Paige, 211; *Caldwell v. Lieber*, 7 Paige, 483; *Righter v. Stall*, 3 Sandf. Ch. 608; *Fish v. Koster*, 28 Hun, 68; *Astor v. Palach*, 49 How. Pr. 231; *Pool v. Osborn*, 8 N. Y. Civ. Pro. Rep. 232.)

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*William McArthur, Roger Foster and J. Campbell Thompson* for respondent. The court had ample power to grant an extra allowance in the suit. (*United Press v. N. Y. Press Co.*, 164 N. Y. 406; *Coates v. Goddard*, 2 J. & S. 118; *Miller v. Watson*, 13 J. & S. 591; *Robbins v. Gould*, 1 Abb. [N. C.] 133; *Coffin v. Coke*, 4 How. Pr. 616.) The case was difficult and extraordinary. It is incumbent on the appellants to show that there was an abuse of discretion in the granting of the motion. (*Wilbur v. Williams*, 4 App. Div. 444; *Carpenter v. Miles*, 95 Hun, 51; *Tolman v. S., etc., R. Co.*, 31 Hun, 403.)

O'BRIEN, J. The only question presented by this appeal is the right of the defendant to an additional allowance, which was granted by the trial court and affirmed on appeal. Stating the question in another way, it is whether the case upon the conceded facts was difficult and extraordinary within the meaning of the Code.

The action was brought to recover the value of two car-loads of horses, and judgment was demanded for upwards of twenty-two thousand dollars. It was an action on contract for the recovery of money only. The defendant's answer raised an issue with respect to some of the material allegations of the complaint. It also set up a counterclaim, and then alleged that a suit had been brought by the plaintiffs in the courts of New Jersey for the same claim sought to be recovered in this action; that the action was brought to trial and a verdict rendered in favor of the defendant. It was the case of a former judgment between the same parties for the same cause of action embraced in the pleadings in this case and interposed as a bar to any further prosecution by the plaintiffs of the claim in question. The action, in its general features, would seem to be a very simple one. The plaintiffs sought to recover money on a contract for the sale of property, and the principal defense was that the controversy had been determined by a judgment between the same parties in another state.

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The action was never brought to trial, in the sense in which a trial of issues is generally understood. The case was disposed of by an agreement or stipulation between the respective counsel, the material part of which is as follows: "The plaintiffs offer to allow judgment to be taken against them by the defendant dismissing the complaint with costs in favor of the defendant against the plaintiffs, and for judgment in favor of the plaintiffs dismissing the defendant's counter-claim." So that, upon the record, it would seem that both parties succeeded. The plaintiffs procured the dismissal of the defendant's counterclaim, and the defendant procured the dismissal of the plaintiffs' complaint. Who the successful party was, if either, at the termination of the controversy is not very clear from the record; nor is it very important. Thus far there was nothing about the case, either of law or fact, that would make it difficult or extraordinary. The fact that the defendant was obliged to procure the record of a trial of the same questions in another state adds nothing to the claim that the case was difficult and extraordinary. Indeed, the plea of a former judgment, as a bar to another action, rather simplifies the controversy than otherwise.

The defendant's counsel has attempted to show that the case was difficult and extraordinary by affidavit, but these affidavits do not change the case in the least as it appears from the pleadings. It is impossible to make anything of it but an action to recover money on a contract, met by the defense of a former adjudication. The opinion of the plaintiffs' counsel that the case was difficult and extraordinary does not change the situation. Whether a case is difficult and extraordinary frequently depends upon facts, but here there is no controversy about the facts, and this court must determine the question as one of law; that is to say, that when there is no dispute about the material facts, whether a case is difficult and extraordinary is a question of law. That question is open to review in this court on an appeal from the judgment, since the extra allowance is included in the judgment and a part of it. It is said in behalf of the defendant

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that the allowance in this case was discretionary; and so it was, if the court had power to make it. But the question whether the trial court had power to grant any additional allowance is a question of law subject to review in this court and it has been reviewed very frequently. It will be observed that, under the statute, the case must be both difficult and extraordinary and it must be a case in which there was a defense interposed. If it lacks either of these three requirements it is not brought within the provisions of the Code, and consequently the court would have no power to make such an allowance. This court has said that the words "difficult and extraordinary" are words of limitation upon the power of the court and that the practice of making an additional allowance substantially in every case cannot be sanctioned. These words must be given their usual and accepted meaning. (*Standard Trust Co. v. N. Y. C. & H. R. R. Co.*, 178 N. Y. 407.) In view of what this court has said in that case I am unable to see how the allowance in this case can be justified. It was not, I think, a difficult and extraordinary case. Indeed, it was not either difficult or extraordinary, but a very common and simple controversy, and in view of the conceded fact that there was no trial whatever of the issues, the allowance cannot be sustained, unless we are prepared to hold that it may be granted in substantially all cases.

Moreover, the plaintiffs succeeded in procuring a dismissal of the defendant's counterclaim. The counterclaim, from an inspection of the pleadings, would seem to be more formidable than the case set out in the plaintiffs' complaint. Generally speaking, an extra allowance is awarded to the successful party only, but here both parties, as already pointed out, seem to have succeeded as to part of their respective claims. The defendant's counterclaim was dismissed, but that would be no obstacle to an affirmative action brought by the defendant as a plaintiff on the same claim, and should the defendant elect to bring a new action on the counterclaim and recover, I see

no reason why, upon the practice adopted in this case, he would not be entitled to another additional allowance.

It has been held that the court has no power to grant an extra allowance in a controversy submitted to the court upon an agreed case. (*People v. Fitchburg R. R. Co.*, 133 N. Y. 239.) It is true that the parties in this case did not agree upon the facts, but they did agree upon a disposition of the controversy without a trial. The case was not disposed of by an offer of judgment under the Code, since the plaintiffs' offer was to have both the complaint and the counter-claim dismissed. The parties, in effect, settled the controversy without trial. We think that the appeal presents a question of law. (*Hanover Fire Ins. Co. v. Germania Fire Ins. Co.*, 138 N. Y. 252; *Conaughty v. Saratoga Co. Bank*, 92 N. Y. 401; *Wright v. Fleischmann*, 99 App. Div. 547.) The judgment should, therefore, be modified by striking out the amount of the extra allowance as of the date of the entry of the judgment, and as so modified affirmed, with costs to the plaintiffs.

WERNER and CHASE, JJ., concur; VANN and WILLARD BARTLETT, JJ., concur in result on the ground that the action was practically settled between the parties by their stipulation, and hence there is no legal basis for the award of an extra allowance of costs; GRAY, J., dissents upon the ground that the case was one within the discretion of the courts below upon the facts; CULLEN, Ch. J., absent.

Judgment accordingly.

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MARY SAN FILIPPO, Respondent, v. AMERICAN BILL POSTING COMPANY, Appellant.

NEGLIGENCE — LIABILITY OF BILL POSTING COMPANY FOR INJURIES CAUSED BY FALL OF SIGNBOARD. A bill posting company which had the right to maintain a bill board or sign on the roof of a building under a formal lease from the tenant in possession thereof, in which the company agreed to keep the roof where the board was erected in good repair and to indemnify the tenant in possession of the building from any and all

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damages and claims that he might be liable for in consequence of the maintenance of the board, is liable for personal injuries resulting from the fall or blowing down of the board by reason of the careless or unsafe manner in which it had been erected.

*San Filippo v. American Bill Posting Co.*, 112 App. Div. 395, affirmed.

(Argued May 8, 1907; decided May 28, 1907.)

APPEAL from a judgment entered April 28, 1906, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term after the rendition of a special verdict, and directed judgment in favor of plaintiff on such verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Robert H. Elder* for appellant. The dismissal of the complaint was proper. (*Reynolds v. Van Buren*, 155 N. Y. 120; *McAdam on Landl. & Ten.* [2d ed.] 51; *Taylor v. Caldwell*, 3 B. & S. 826; *Wood on Landl. & Ten.* 348, § 227.)

*Henry A. Powell* for respondent. The dismissal of the complaint by the trial justice constituted error, and the Appellate Division was right when it reversed his order and the judgment entered upon it. (*O. J. Gude Co. v. Farley*, 28 Misc. Rep. 184; *Benson v. Mayor, etc.*, 10 Barb. 236; *Brenn v. City of Troy*, 60 Barb. 421.)

O'BRIEN, J. The plaintiff sustained personal injuries in consequence of the falling or blowing down of a large billboard or sign which had been placed upon the roof of a building in the city of Brooklyn. It was alleged that the defendant maintained the sign, which had been erected in a careless and unsafe manner, and that by reason of the defendant's negligence the sign fell or was blown down on or about the 5th day of November, 1902, resulting in bodily injury to the plaintiff.

At the close of the testimony given upon the trial the defendant's counsel made a motion to dismiss the complaint. The court submitted the issues of fact involved in the case to the jury and a special verdict was returned in favor of the plaintiff. Subsequently, the learned trial judge set aside the verdict and dismissed the complaint, to which ruling an exception was taken. On appeal the judgment of the trial court was reversed and judgment ordered in favor of the plaintiff on the verdict. It was assumed at the trial that the case was controlled by our decision in *Reynolds v. Van Beuren* (155 N. Y. 120). The facts in that case were, we think, materially different from the facts in the case at bar. In the former case it appeared that the defendants did not own the building on which the sign had been placed nor the sign itself. They did not erect the sign and had no control over it. They had the right to place bills or advertisements upon it, but had no right to remove it or to change its location. They paid the tenant in possession of the building a compensation for the use of it, and that was the extent of their obligation or duty. This court held, upon these facts, that the defendants were not liable for the result of the accident and were not chargeable with any breach of duty in respect to the care of the sign. The tenant in possession of the building was in control of the roof and could remove the sign at pleasure, and was liable for the result of any negligence in maintaining it. The reasons given for the decision in that case are not at all applicable to the case at bar, since the legal relation of the defendant to the sign is entirely different.

Here, the defendant had a formal lease which gave to it "the right to maintain the signs now on the roof and side walls of Nos. 64 and 66 Main street in the Borough of Brooklyn for one year from January 3d, 1902. It being agreed that the parties of the second part shall keep the roof in repair where the board is erected, and also remove all rubbish from the roof, and the failure to do so upon notice of ten days from the agent of the party of the first part shall render this agreement void. In case the property is sold or own-

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ership changed, the parties of the second part will vacate within ten days' notice, and the party of the first part to return rent *pro rata* for the unexpired term for which the said signs are not displayed." The defendant in this case also agreed with the tenant in possession to take the premises on the terms as above set forth and to indemnify the tenant in possession from any and all damages and claims that he may be liable for in consequence of the maintenance of the sign. The obligation and duty was thus imposed upon the defendant to maintain the sign and to protect the tenant in possession from all liability arising from such an accident as the one in question. We would feel bound to follow the decision in the case of *Reynolds v. Van Beuren (supra)*, where the question arises upon the same or similar facts. We think, however, that there is a wide difference between the facts in the present case and the facts in the *Van Beuren* case, and hence the judgment now under review is right and should be affirmed, with costs.

CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed. 

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JOHN W. OLMSTEAD, Respondent, v. EDMUND G. RAWSON,  
Appellant.

WARRANTY DEED — ACTION UPON COVENANTS THEREOF TO RECOVER AMOUNT OF DOWER AND COSTS PAID IN ACTION FOR DOWER DEFENDED BY GRANTEE — WHAT GRANTEE MAY RECOVER. Where it was determined in an action to enforce a widow's right of dower in premises, held by a grantee under a deed containing covenants of warranty and quiet enjoyment, that the widow was entitled to dower as claimed, and that her claim could not be properly satisfied by setting off to her any part of the premises, and, the widow having filed a consent to take a gross sum in lieu of dower, a judgment was entered directing a sale of the property in accordance with the statute (Code Civ. Pro. §§ 16, 17, etc.), the sale under such judgment did not operate as an absolute and total eviction of the grantee from the entire premises; it was simply a method of procedure by which there was a substitution of the proceeds of the land in the place of the land itself, actual partition thereof being impracticable,

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so that the proceeds could be divided between the widow and the grantee, according to their respective interests, after the value of the widow's right of dower therein had been ascertained; the grantee of such premises cannot recover, therefore, in an action brought against his grantor upon the covenants in his deed, the entire purchase price paid for the premises, together with his costs and disbursements incurred in defending the action for dower. Where, however, notice was given to the grantor to defend in the dower action, and upon his failure so to do the grantee defended in good faith, the latter may recover the amount paid to the widow for her right of dower and the costs and disbursements allowed and paid to her in the action for dower, also his own costs and disbursements in defending such action and the referee's fees and expenses therin, together with interest on each item from the date of sale, except the item of his own costs and expenses, and upon that from the date of judgment in the action for dower.

*Olmstead v. Rawson*, 110 App. Div. 809, modified.

(Argued April 12, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 15, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

*Nash Rockwood* for appellant. The court adopted an improper measure of damages in relation to the three lots affected by the widow's right of dower. (*Wager v. Schuyler*, 1 Wend. 553; *Patrie v. Folz*, 22 J. & S. 223; *Dimmick v. Lockwood*, 10 Wend. 142; *Andrews v. Appel*, 22 Hun, 429; *Grant v. Tallman*, 20 N. Y. 191; *Hunt v. Raplee*, 44 Hun, 149; *Morris v. Phelps*, 5 Johns. 49; *Giles v. Durgo*, 1 Duer, 331; *Hymes v. Esty*, 133 N. Y. 347; *Staats v. Ten Eyck*, 3 Caines, 111.)

*Fred Linus Carroll* for respondent. The trial court adopted the correct rule of damages. (*Hymes v. Esty*, 133 N. Y. 342; *U., C. & S. V. R. R. Co. v. Gates*, 8 App. Div. 181; *Jenks v. Quinn*, 61 Hun, 427; 137 N. Y. 223; *Charman v. Hibbler*, 31 App. Div. 477; *Lourman v. Jarvie*, 82

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App. Div. 37; *Du Bois v. Hermance*, 56 N. Y. 673.) The claim that the plaintiff, respondent, holds the equitable title to lot No. 70, the east half of lot No. 71 and lot No. 108 in the name of Hiram McCuen, is not supported by the evidence. (*Cowdry v. Coit*, 44 N.Y. 382.)

HISCOCK, J. Respondent recovered in this action substantially the entire purchase price paid for premises conveyed to him by defendant, with interest and various costs and expenses as damages, for a breach of covenants of warranty and of quiet possession contained in the conveyance of said premises. Damages have been allowed upon the theory of an entire failure of title to part of the premises and of a complete eviction from the balance. We think that the judgment awarded was so erroneous with respect to the latter branch of the case that it must be modified.

January 13, 1902, the appellant and his wife executed a deed whereby, in consideration of the sum of \$1,183.00, they purported to convey to respondent lots Nos. 70, 108, 109 and one-half of lot No. 71 in the town of Benson, Hamilton county. As already stated, said conveyance contained a covenant of warranty and also of quiet enjoyment. The trial justice found that the appellant never had title to lot 109, and that respondent never obtained possession thereof, and that, therefore, the latter was entitled to recover of the former in this action the proportionate purchase price and value of said lot, which was fixed at \$480.00, with interest, from the date of payment of the consideration. The findings with respect to this lot are not seriously challenged or criticised except as they relate to the proportion of the purchase price to be recovered on account thereof, and we do not think that the criticisms upon this point have any substantial merit.

After respondent had entered upon possession of the balance of the premises covered by his deed, one Mrs. Rhodes commenced an action against him asserting a right of dower in said balance of said premises. He caused a copy of the summons and complaint in such action to be served upon this appellant, together with notice of action and demand

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that he appear therein and defend. This the latter refused to do. Respondent then appeared and defended in the action, but Mrs. Rhodes established her claim of dower, and as we may assume, it having been duly determined that such claim could not be properly satisfied by setting off to her any part of the premises, and she having filed a consent to take a gross sum in lieu of dower, judgment was entered directing a sale of the premises in accordance with the provisions of the Code upon that subject. (Code Civ. Pro. sect. 1617, etc.) Upon the sale had in accordance with such judgment the premises realized the sum of \$481.00. The dower of the plaintiff in that action was fixed at \$212.45, and the balance of the proceeds so appropriated to the payment of costs and expenses that there remained a balance of only \$14.09 to be paid to the respondent in this action on account of his interest, and he has been allowed to recover the entire amount of the purchase price of said premises with interest less this \$14.09, and in addition upwards of \$200 costs and disbursements incurred in that action.

Such a result as is above stated could only be reached by treating the sale under the judgment in the dower action as a complete and entire eviction of respondent from the premises affected thereby. That this theory was adopted is made evident by the finding of the learned trial judge that said premises "were sold pursuant to said decree and judgment (in the dower action) by the referee therein named at public sale \* \* \* to one Hiram McCuen, who immediately entered into and upon the said premises and ejected and removed the said plaintiff from the possession and occupation of the same with the appurtenances thereto, and that said McCuen has ever since continued in possession of said premises under such paramount legal title and excluded said plaintiff from the possession and occupation thereof." Due consideration demonstrates that this theory in regard to the effect of the claim of dower right and of the judgment determining and providing for the satisfaction of the same is erroneous.

The plaintiff under her claim was entitled to possession of a third of the premises for life or to some gross sum in lieu

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thereof. If her rights had been satisfied by setting off to her a certain portion of the premises it is clear that plaintiff would have suffered an eviction only to the extent of the premises so set off. The premises, however, apparently were of such a character that it was not practicable to pursue this course and, therefore, the other course sanctioned by the Code was adopted of adjudging a sale of the entire premises in order that a proper proportion of the proceeds of the premises, instead of the premises themselves, might be devoted to the satisfaction of the claimant's rights. But such sale did not, as has been determined by the learned courts below, operate as an eviction of plaintiff perpetually and absolutely from all of the premises. It was simply a method of procedure adopted for the purpose of satisfying the rights of various parties interested in the premises through the distribution and division of the proceeds thereof, the actual partition of the premises themselves being impracticable. That this sale did not operate as a total eviction of respondent is made clear by section 1624 of the Code of Civil Procedure, and the final judgment therein provided for to the effect that "upon confirming the sale, the court must ascertain, by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities." It is still further made evident by the fact appearing in this case that respondent has received certain proceeds of the sale in the place of his recognized interest in the land. The Code provides for and there has been a substitution of proceeds in the place of the lands which produced those proceeds, and of course this is a complete answer to the proposition that respondent had been entirely excluded from and had lost all of his interest in the premises through the dower proceeding.

Readily reaching this conclusion we then come to a consideration of the items for which respondent should be allowed to recover.

As already indicated, there is not presented upon this appeal any reason why he should not be allowed to recover for the

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proportionate value of lot No. 109, of which he never obtained possession, together with interest. He also should be allowed to recover, with interest from the date of sale, the amount allowed to Mrs. Rhodes for her dower right. It would appear that her dower right has been fixed at a larger sum than was proper. But whether this is so or not, we think that appellant should be bound by the judgment in the dower action in respect to this item, and that neither legally nor equitably is he entitled to any relief in respect thereto. He had full notice of the commencement of the action and was properly requested to defend the same, and having seen fit to ignore the action, with the covenants of warranty and quiet possession outstanding against him, he is not entitled to any particular sympathy if a judgment has been rendered which is unduly unfavorable to him.

There is nothing before us to indicate that the respondent did not properly and in good faith defend the dower action. Some complaint is made because he did not accept Mrs. Rhodes' offer to take a gross sum in lieu of dower and thereby settle and terminate that action. But especially in view of the notice which had been served upon appellant to take charge of the defense, we do not think it can be said as matter of law that respondent was bound to settle rather than litigate and compel proof of this claim. Under those circumstances, respondent should be allowed to recover in this action the costs allowed to plaintiff in the dower suit, his own proper and legal costs, disbursements and expenses in defending said action, the referee's fees and expenses of sale, with interest from the date of sale upon each item, except that of his own costs and disbursements, and upon that from the date of judgment in the dower suit, February 1, 1904. These various items upon the present trial have been fixed, respectively, at \$107.74, \$218.72, \$38.82 and \$10. Upon the present trial it also appears that there was allowed from the proceeds of the sale, which amounted to the same as payment by respondent, the sum of \$32.65 for taxes.

The judgment should be modified by reducing the amount of the judgment of the Trial Term of the Supreme Court to

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the sum of one thousand three hundred forty-five dollars and twenty cents (\$1,345.20) as of the date of the entry thereof, to wit, May 4th, 1905, and as so modified the judgment is in all things affirmed, with costs to the respondent in the Appellate Division, but without costs in this court to either party.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT and VANN, JJ., concur; CHASE, J., not sitting.

Judgment accordingly.

**THE PEOPLE OF THE STATE OF NEW YORK ex rel. NEW YORK ELECTRIC LINES COMPANY, Appellant, v. WILLIAM B. ELLISON, as Commissioner of Water Supply, Gas and Electricity of the City of New York, et al., Respondents.**

**MUNICIPAL CORPORATIONS—NEW YORK ELECTRIC LINES COMPANY NOT ENTITLED TO BUILD INDEPENDENT SUBWAYS IN CITY OF NEW YORK.** The principal, fundamental and essential purpose of the incorporation of the New York Electric Lines Company is to construct, use and maintain lines of wire for conducting electricity. The conduits in which the wires are to be laid are mere incidents to such purpose. The acts of 1885 and 1887 (L. 1885, ch. 439; L. 1887, ch. 716), relating to the placing of electrical conductors under ground in cities of this state, are proper police regulations which the legislature had the power to enact and impair no contract right of the New York Electric Lines Company, although such company, by chapter 483 of the Laws of 1881, was entitled to lay electric conductors under ground in the streets of cities upon securing permission from the common council of the city, and had secured such permission; having failed to take advantage thereof before the passage of such acts, it must comply with their provisions and with the plans adopted thereunder for the purpose of placing electrical conductors under ground. It was the duty of the commissioner of water supply, gas and electricity, therefore, to deny an application of said company for permission to open the streets of the city to construct an independent line of subways or conduits for the purpose of laying electric conductors therein.

*People ex rel. N. Y. El. Lines Co. v. Ellison*, 115 App. Div. 254, affirmed.

(Argued February 21, 1907; decided May 28, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

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November 10, 1906, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

*David B. Hill, J. Aspinwall Hodge* and *Frank B. Vermilya* for appellant. The franchise granted to the relator by the state is a contract and was made complete by the ordinance of 1883 and its acceptance by the relator, and it is protected by the Federal Constitution against impairment, either by the legislature or the municipal authorities. (*Davis v. Mayor, etc.*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *People v. Sturtevant*, 9 N. Y. 263; *Mayor, etc., v. S. A. R. R. Co.*, 32 N. Y. 261; *Mayor, etc., v. T. A. R. R. Co.*, 33 N. Y. 42; *City of Rochester v. R. Ry. Co.*, 182 N. Y. 99; *Presbyterian Church v. New York*, 5 Cow. 538; *Village of Carthage v. Frederick*, 122 N. Y. 268; *Wright v. Nagle*, 101 U. S. 791; *New Jersey v. Yard*, 95 U. S. 104.) It was not the intention of the legislature by the subway acts to so modify the relator's franchise and contract as to deprive it of the substantial property right of constructing its own subways. (*W. U. T. Co. v. Mayor, etc.*, 38 Fed. Rep. 552; *E. S. Co. v. B. & S. A. R. R. Co.*, 87 Hun, 279; *Turner v. Sawyer*, 150 U. S. 585.) If it is held that any provision of the subway acts deprives the relator of its right to construct its own subways, then such portion of the act is an impairment of the relator's contract with the state and city and void. (*S. W. W. Co. v. Vil. of Skaneateles*, 161 N. Y. 154; *Lake View v. R. H. C. Co.*, 70 Ill. 191; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Smith v. S. L., etc., R. R. Co.*, 181 U. S. 248; *Fletcher v. Peck*, 6 Cranch, 87; *N. O. G. L. Co. v. L. L. Co.*, 115 U. S. 650; *Broughton v. Pensacola*, 93 U. S. 266; *Red Rock v. Henry*, 106 U. S. 596; *Mount Pleasant v. Beckwith*, 100 U. S. 514.) In any view of the relator's rights in this proceeding, it is entitled to a writ commanding the respondent to issue a permit, and, in his discretion, to regulate the manner of the exercise of the relator's

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rights under its franchise. (*Howland v. Eldredge*, 43 N. Y. 457, 461; *People ex rel. Francis v. Troy*, 78 N. Y. 33.)

*W. B. Burnet* for intervenors. The contention that the franchise was modified by the state, in the exercise of the police power, and the relator's individual right to open the streets for the laying of electrical conduits of its own has passed, its franchise having been so modified by competent legislation that it cannot assert an individual right to operate its own subway system, is untenable. (*Trustees, etc., v. Jes-sup*, 162 N. Y. 122; *People ex rel. C. S. Co. v. Monroe*, 85 App. Div. 542; *The Binghamton Bridge*, 3 Wall. 51; *W. R. B. Co. v. Dix*, 6 How. [U. S.] 507; *People v. B. R. R. Co.*, 126 N. Y. 29; *Walla Walla v. W. W. Water Co.*, 172 U. S. 1; *N. O. G. Co. v. L. L. Co.*, 115 U. S. 650; *N. O. W. W. Co. v. Rivers*, 115 U. S. 674; *St. T. W. Works v. N. O. W. Works*, 120 U. S. 640; *C. C. G. L. Co. v. N. O. G. L. Co.*, 27 La. Ann. 138-147.)

*William B. Ellison Corporation Counsel* (*Theodore Connelly, William P. Burr, William J. Clark and Leonce Fuller* of counsel), for respondent. The subway acts (L. 1884, ch. 534; L. 1885, ch. 449) modified the franchise granted by the state to the company, and on its failure to comply with such new requirements the company lost its right to proceed thereunder. (*People ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 598; 145 U. S. 190; *M. E. L. Co. v. Grant*, 31 N. Y. S. R. 254; *E. C. S. Co. v. B. & S. A. R. R. Co.*, 87 Hun, 279.) By the failure of relator to obtain from the board of electrical control approval of its plans, the only right left to the company, under the act of 1885, was to place its wires in the subways constructed under the direction of the board. (*People ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 598; *New York v. Squire*, 145 U. S. 190.) The city having revoked its former grant, the company has no existing right to the use of the streets, and the granting of the permit by the commissioner would be in effect the granting of a new permission, franchise or license, and so *ultra vires*. (*Wilcox v. McClellan*, 185 N. Y. 9.)

CHASE, J. Although many of the facts appearing in the record and necessary to be considered in the determination of this appeal have been frequently stated in the published opinions of the courts in actions or proceedings in which the relator has been a party, it is necessary to restate some of them in expressing my views at this time.

The relator insists that it is entitled as a matter of right to a permit from the commissioner of water supply, gas and electricity of the city of New York, to construct subways or conduits beneath the surface of certain streets in said city and also to have the approval of the borough presidents of the respective boroughs to its opening said streets for the purpose of such construction work.

In 1886 the board of commissioners of electrical subways, of which board the commissioner of water supply, gas and electricity is a successor in authority, devised and made ready for use a general plan for conduits in the city of New York to meet the requirements of the subway act of 1884 (Laws of 1884, chapter 534) and 1885 (Laws of 1885, chapter 499) and by said last act the commissioners were given full authority to compel all companies operating electric wires to use the subway so prepared in accordance with the provisions of said act of 1885. The plan so devised was carried out by a contract with the Consolidated Telegraph and Electrical Subway Company hereinafter further mentioned, which contract was expressly ratified and confirmed by the legislature of this state (Laws of 1887, chapter 716, section 6), and has been upheld by this court (*Am. Rapid Telegraph Co. v. Hess*, 125 N. Y. 641); and pursuant to the authority of chapter 231 of the Laws of 1891 and the consent of said Consolidated Telegraph and Electrical Subway Company further contracts for carrying out said general plan were made with said Consolidated Telegraph and Electrical Subway Company and with the Empire City Subway Company which provide for a division of the work of constructing, maintaining and operating said subways.

The relator has wholly failed to obtain the approval of the

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board of commissioners of electrical subways and its successors in authority to its plan of construction as provided by section 3 of said act of 1885. Apart, however, from questions relating to the technical right of the relator to the writ demanded is the important question of the merits of the relator's claim to proceed as a matter of right to open and excavate in the streets of the city and construct a complete duplicate system of electrical subways therein. In the consideration of that question we will assume without deciding that the relator's corporate powers have not ceased, and that whatever rights the relator obtained by the permit of April 10, 1883, hereinafter referred to, so far as the same is necessary for the purpose of carrying out the principal, fundamental and essential purposes of the relator's incorporation, were and are irrevocable. What are the principal, fundamental and essential purposes of the relator's incorporation? This question must be answered by reference to its articles of incorporation and the acts of the legislature under which they were executed.

Prior to the construction of conduits under the surface of the streets and public places of the city of New York in which to place wires for conducting electricity for power, heat, light, and for telegraphic and telephonic and other similar purposes they were placed on poles or attached to brackets upon buildings and otherwise throughout the city. The line of telegraph wires was the necessary and essential part of the telegraph plant, while the poles and brackets were simply the means by which the wires were held in place.

In the General Telegraph Act of 1848 (Laws of 1848, chapter 265) no reference is made to placing wires under the ground. It provides for the incorporation of companies "For the purpose of constructing a line of wires of telegraph through this state." The act expressly provides that "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the cords or wires of such lines; provided the same

shall not be so constructed as to incommod the public use of said roads or highways, or injuriously interrupt the navigation of said waters." (Section 5.)

In 1853, by chapter 471 of the Laws of that year, the act of 1848 was so amended as to provide that such association is authorized "To erect and construct, from time to time, the necessary fixtures for such lines of telegraph, upon, over or under any of the public roads, streets, and highways."

By chapter 483 of the Laws of 1881 it was further provided: "Any company or companies organized and incorporated under the laws of this state for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this state or partly within and partly beyond the limits of this state, are hereby authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state, subject to all the provisions of law in reference to such companies not inconsistent with this act; provided that such company shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

The number of wires in cities increased to such an extent that they became a public and private nuisance, and seriously interfered with the conduct of business, and in the operation of the fire and other departments of the city, and there was a very general public demand that the wires be removed from the streets and placed under the surface of the ground.

Several new companies were organized for the purpose of constructing a line of wires of telegraph as provided by said acts, and on the 14th day of October, 1882, the relator was incorporated under said chapter 263 of the Laws of 1848, which is entitled "An act to provide for the incorporation and regulation of telegraph companies," and also of the acts amendatory thereof and supplementary thereto, "For the purpose of owning, constructing, using, maintaining and leasing

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lines of telegraph wires or other electric conductors for telegraphic or telephonic communication and for electric illumination to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn \* \* \* and for the purpose of owning franchises for laying and operating said lines of electric conductors." And the articles of incorporation expressly declare that they are made "in pursuance to the objects declared" by said act of 1848 and the acts amendatory thereof and supplementary thereto.

It should be constantly borne in mind that the objects declared by the acts of 1848 and the acts amendatory thereof and supplementary thereto do not in terms include authority to construct conduits in which to place the wires or other electric conductors. The construction of conduits is only authorized by the acts as an incident to the construction of lines of electric conductors under the ground. It will also be observed that the general language of the relator's articles of incorporation relating to the purpose of the incorporation conforms to said statutes except that such articles include the word "leasing," which word is not found in the statutes then existing, except as it appears in the amendment of 1862 (Laws of 1862, chap. 425). After its incorporation the relator applied to the board of aldermen for permission to use the streets of the city and on April 10th, 1883, a resolution was passed by said board granting permission to it "To lay wires or other conductors of electricity in and through the streets, avenues, and highways of New York city and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illumination or of telegraphic or telephonic signal in accordance with the provisions of an ordinance to regulate the laying of subterranean telegraph wires and electric conductors in the streets of the city passed by the common council and approved by the mayor December 14, 1878."

The resolution and the ordinance therein mentioned further provide in greater detail for the protection of the interests of

the city, and the resolution also provides for payment to the city of compensation based on the number of feet of trench to be excavated and otherwise. The relator addressed a letter April 16, 1883, to the common council of the city accepting said permission and it therein agreed to and did assume and obligate itself to observe the requirements, provisions, restrictions, conditions and limitations contained therein.

The permission granted to the relator by the board of aldermen was a step in addition to the authority obtained by it through its incorporation. It was a step necessary to enable it to lay its wires and electric conductors under the surface of the streets. The authority obtained by the relator by its incorporation was dependent upon but not enlarged by the permission.

Whatever the incorporators may have had in mind when the articles of incorporation were signed, a reading of the acts upon which the incorporation is based and the articles of incorporation shows conclusively that the principal, fundamental and essential purpose of its incorporation, and of the permission granted to the relator by the board of aldermen, was to construct, use and maintain lines of wire for conducting electricity, and that the conduits in which the wires were to be laid were and are mere incidents to such prime purpose.

The construction and maintenance of the conduits bear the same incidental relation to the real purpose of a telegraph corporation that the erection and maintenance of the poles bore to such real purpose when the wires were strung upon poles instead of being placed under the ground.

Before considering further the incidental character of the construction and maintenance of subways in which to place wires as electric conductors, a reference will be made to the acts of the legislature and the contracts executed in conformity therewith relating to electric subways in the city of New York.

The importance of a general system of subways or conduits under the surface of the streets of the city to include all electric conductors was such as to require action on the part of

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the city to establish such general system. The space necessarily occupied under the surface of the streets of a great city for sewer, water, gas, steam and other pipes, subways for electric conductors and openings for transportation and many other purposes for which space is required makes it necessary to consolidate, combine and group the spaces used as much as possible.

Acts properly looking to that end are necessary in the public interest, not only on account of preserving and economizing the space under the surface of the streets, but also to avoid any unnecessary interference with the surface of the streets and thus incommod the public in the general or ordinary use of the streets themselves. If the surface of the streets is to be constantly opened to allow corporations and persons authorized to use electric conductors to construct their own conduits independent of a general plan or system it would become almost as intolerable as the maintenance of innumerable wires strung above the surface of the ground. The desirability and importance of one system of conduits for all electric conductors is manifest and conceded. By the subway act of 1884 it was provided that all telegraphic, telephonic and electric light wires and cables used in any incorporated city having a population of 500,000 or over should thereafter be placed under the surface of the streets of said city, and it was further provided that such wires and cables, including what is known as telegraph poles then in the streets of such cities, should be removed from the surface of the streets on or before the 1st day of November, 1885, and in case any company should fail to comply with the provisions of the act the local governments of said cities should without delay remove them therefrom.

The subway act of 1885 must be read in connection with said act of 1884. It provides for the appointment of a board of commissioners of electrical subways, which board was thereby charged with the responsibility of enforcing the subway act of 1884. It is further expressly provided by said act of 1885:

Section 4: "It shall be the duty of said board of commissioners to carefully investigate any and all methods proposed by any such company (any company operating or intending to operate electrical conductors in said city) for electric lighting or electric communication by the use of conductors \* \* \* provided no suitable plan is proposed or in use, within sixty days after the passage of this act, it shall be the duty of such board to cause to be devised and made ready for use such a general plan as will meet the requirements of said act and of this act, and the board shall have full authority to compel all companies operating electric wires to use such subway so prepared in accordance with the provisions of this act."

No suitable plan was proposed or in use within sixty days from the passage of said act, and the board of commissioners of electric subways thereafter devised and made ready for use a general plan to meet the requirements of the acts. Proposals for building conduits in accordance with the plans and specifications adopted by the commission were received from the relator and other companies. They were referred to the engineer and counsel to the commission, each of whom reported thereon to the commissioners, and on July 16, 1886, the commission accepted the proposal of the Consolidated Telegraph and Electrical Subway Company. An agreement was entered into by the commissioners with said Consolidated Telegraph and Electrical Subway Company, dated July 27th, 1886, and it was with some amendments and modifications re-executed April 7, 1887. By chapter 716 of the Laws of 1887 the agreement as so amended and modified was expressly ratified and confirmed.

Pursuant to chapter 231 of the Laws of 1891 a further contract with the Consolidated Telegraph and Electrical Subway Company was made May 15, 1891, which relates to conduits having high tension wires and contemporaneously therewith a further agreement with the Empire City Subway Company which relates to conduits for low tension wires. All of the contracts mentioned were executed in behalf of the city

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of New York pursuant to the authority of said acts. The contract with said Consolidated Telegraph and Electrical Subway Company as amended and the contract with the said Empire City Subway Company each provides that nothing therein contained shall be construed as granting any exclusive privilege, immunity or franchise. The contracts do not give said companies the exclusive right to maintain said subways and conduits for electric conductors (*Empire City Subway Co. v. B. & S. A. R. R. Co.*, 87 Hun, 279; affd., 159 N. Y. 555), but the commissioners by said contracts are required in good faith to carry out the terms of said contracts on their part, and by the agreement with said Empire City Subway Company it is provided: "Said parties of the first part (Board of Electrical Control, successor of Board of Commissioners of Electrical Subways) hereby agree to use all lawful means within their power to compel all authorized persons or companies using telegraph and telephone conductors \* \* \* to place their conductors in said subways, conduits and ducts and to pay a fair rental for the space occupied therein."

Said contract also provides: "The spaces in said subways, conduits and ducts shall be leased by the party of the second part (Empire City Subway Company) to any company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue, or highway in the city of New York \* \* \* if it or they shall apply for the same." It also provides: "The party of the second part may fix a fair scale of rents to be charged according to the kind of conductors and the amount of space required therefor which shall be at the same rate to all the occupants having a like use of said conduits and ducts, but the scale of rentals or any charges fixed or made by the party of the second part shall at all times be subject to the control, modification and revision of the parties of the first part."

It also provides: "All companies occupying space in said subways, conduits and ducts shall own their own conductors and shall have the full management and control thereof." The constitutionality of the subway acts and the reasonable-

ness of said contracts were denied and have frequently been disputed in the courts.

The American Rapid Telegraph Company resisted the efforts of the commissioners of electrical subways to compel it to remove its wires and poles from the streets and place its electric conductors in the subways of the Consolidated Telegraph and Electrical Subway Company. In or prior to 1890 said American Rapid Telegraph Company brought an action against the commissioners to restrain them and the mayor and other city officers from cutting, pulling down, removing or otherwise injuring any of the lines of telegraph poles and wires owned by it in the streets of said city. It failed to sustain its action. An appeal was taken from the judgment entered against it after the trial of that action and on such appeal the judgment of the Special Term was sustained (*American Rapid Telegraph Co. v. Hess*, 35 N. Y. S. R. 606) and an appeal was then taken to this court where the judgment was again sustained (125 N. Y. 641). In that case this court fully sustained the proposition that the legislature cannot divest itself of its power of control over streets for public purposes. In the opinion in that case, referring to said contracts, the court says: "We have carefully scrutinized the contract entered into by the board of electrical control with the defendants, the Consolidated Telegraph and Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical and the power of the legislature to authorize such a contract and to confirm it when made, is beyond doubt. These acts of 1884, 1885 and 1887 have been under consideration in several cases and have uniformly been upheld and enforced. (*People ex rel. N. Y. Elec. Lines Co. v. Squire*, 107 N. Y. 593; 1 N. Y. S. R. 633; *U. S. Ill. Co. v. Hess*, 19 id. 883; *U. S. Ill. Co. v. Grant*, 27 id. 767; *Western Union Tel. Co. v. Mayor, etc.*, 38 Fed. Rep. 552, opinion by WALLACE, J., in the U. S. Circuit Court.)"

The American Rapid Telegraph Company by the acts under which it was incorporated was authorized by express terms to construct lines of telegraph along the public roads and high-

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ways, and to erect necessary fixtures, including posts, piers or abutments for sustaining the cords or wires of such lines.

This court refrained from saying that said telegraph company did not by the acts under which it was incorporated obtain some sort of franchise in the streets of the city. The plaintiff claimed that it had a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the Federal Constitution and that the city could not remove the poles or wires from the streets except upon compensation to it ascertained in the manner prescribed by the Constitution in cases where private property is condemned for public use. This court held that the property was not taken for public use, but that after the passage of the act referred to and the building of the subways and the notice to the plaintiff it had no right longer to maintain its poles and wires above the surface of the streets. The acts of the legislature and contracts, so far as they modify the property rights of the telegraph company, were a proper exercise of the police power, notwithstanding that they resulted in substantial expense to said company.

Soon after the first contract was made with the Consolidated Telegraph and Electrical Subway Company, the relator made application to the commissioner of public works for leave to make excavations in the streets of the city to construct its line of electric conductors. The commissioner refused to grant the permit, and the relator then applied to the Court of Common Pleas for a writ of mandamus to compel the granting of such permit. The application for the writ was refused (*People ex rel. New York Electric Lines Company v. Squire*, 1 N. Y. S. R. 633), and an appeal was taken therefrom to the General Term of the Court of Common Pleas (6 N. Y. S. R. 281), and from that court to this court (107 N. Y. 593), and from this court to the United States Supreme Court (145 U. S. 175), in all of which courts the order of the Court of Common Pleas was affirmed.

ALLEN, J., in the Court of Common Pleas, says: "It is my opinion that chapter 499 of the Laws of 1885 applies to the

relator \* \* \* the legislature intended that the subway commissioners should have jurisdiction over the laying of all electric wires and cables and of all companies using or intending to use underground wires through the streets, and authorized them to require conformity to plans approved by them \* \* \* I do not think that chapter 499 of the Laws of 1885 takes away or materially alters or impairs the rights which the relator possessed by way of franchise prior to the passage of said act. This act does not take away the relator's franchise, but simply regulates its use."

RUGER, Ch. J., in this court, referring to the subway act, said: "They do not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others and in such way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible. That regulations of the character provided for in these acts are strictly police regulations and such as no chartered rights can nullify or override is too clear to admit of dispute."

LAMAR, J., in the United States Supreme Court, said: "In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. \* \* \* Neither can it be said that the acts of 1885 and 1886 have a retroactive effect at least so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883 which it accepted as the basis of the contract it claims to have entered into were expressly subject to regulation in their use by the highest legislative power in the state acting for the benefit of all interests affected by those rights and for the benefit of the public generally so long as the relator's essential rights were not impaired or invaded. \* \* \* In none of those acts is there any unqualified right conferred upon any electrical company to construct its lines wherever or in whatever manner it might choose. On the contrary, in every one of those acts provision is made for the security of the rights of the public in the use of the streets

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and highways which may be used by the electric companies.  
\* \* \* Independently, however, of the contractual relations of the relator, the statutes of 1885 and 1886 are so clearly an exercise of the general police powers of the state that we do not deem it necessary to add anything on that point to what was said by the Court of Appeals of New York."

The essential purpose of the relator's incorporation and of the permission acquired by it April 10, 1883, was to lay electric conductors, and its rights in that respect have not been materially or essentially violated or impaired.

The only effect of the statutes and contracts made in pursuance thereof is to require that the electric conductors to be laid by the relator shall be placed in conduits constructed in accordance with the general plan prepared in accordance with said statutes, instead of allowing the relator to construct its own subways for laying such electric conductors.

The rights of the relator have not in my judgment been impaired by said acts and contracts in any essential particular.

As there is nothing in the record before us to show that the conduits constructed pursuant to said contracts are not sufficient and adequate for all purposes required under said contract, including space for laying any wires desired by the relator; and as it does not appear but that all the parties to said contracts are carrying out the terms thereof in good faith, and that the relator, if authorized to use telegraph and telephone conductors in said city may, upon request and on payment of a reasonable rental therefor, use said conduits for carrying out all the purposes for which the relator is incorporated, and the essential purposes for which the said permission was granted, it was in my judgment the duty of the commissioner of water supply, gas and electricity, apart from any other considerations, to deny the relator's application, and the order appealed from should be affirmed, with costs.

HAIGHT, J. I concur in the result reached by CHASE, J. The relator was incorporated in 1882 "for the purpose of owning, constructing, using, maintaining and leasing lines of

telegraph wires or other electric conductors for telegraphic or telephonic communication, and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the city of New York." In April, 1883, the board of aldermen passed a resolution permitting it to lay its wires or other conductors of electricity through the streets of the city under ground, upon the condition that the work should be performed under the control and supervision of the commissioner of public works.

In 1885, before the relator had undertaken the laying of its conductors under ground, the legislature, by chapter 499, created a board of electrical subways, to whom was given the control of all electrical wires and cables to be used in the streets of the city, empowering the board to devise and adopt a plan by which electric wires and conductors could be placed under ground, and authorizing their use when and where needed for the convenience of the public. Thereupon a plan was devised and adopted by the commissioners which, in substance, called for the construction of conduits under the streets of the city through which electric wires and conductors could be run and used by those entitled, upon the payment of a reasonable rental, and a contract was entered into with another corporation to construct such conduits, and upon the completion thereof, all companies intending to operate electrical conductors, were required to place them through such conduits and remove their wires from the streets. Subsequently, by chapter 716 of the Laws of 1887, such contract was ratified and confirmed, and thereafter it was made unlawful for any corporation or individual to take up the pavement of the streets of the city, or to excavate therein for the purpose of laying under ground any electrical conductors unless by a permit, in writing, of the board of commissioners of electrical subways.

In July, 1886, the relator applied to the department of public works for permission to open the streets of the city, for the purpose of laying its wires and conductors. This permission was refused, and thereupon a peremptory writ of mandamus was applied for, to compel the commissioner to

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grant such permit. This was denied by the court. The relator has now applied to the commissioner of water supply, gas and electricity, who, by a subsequent statute, has become charged with the duties that devolved upon the commissioners of electrical subways, for such leave, and has again been refused. It now seeks by mandamus to compel the granting of such permission.

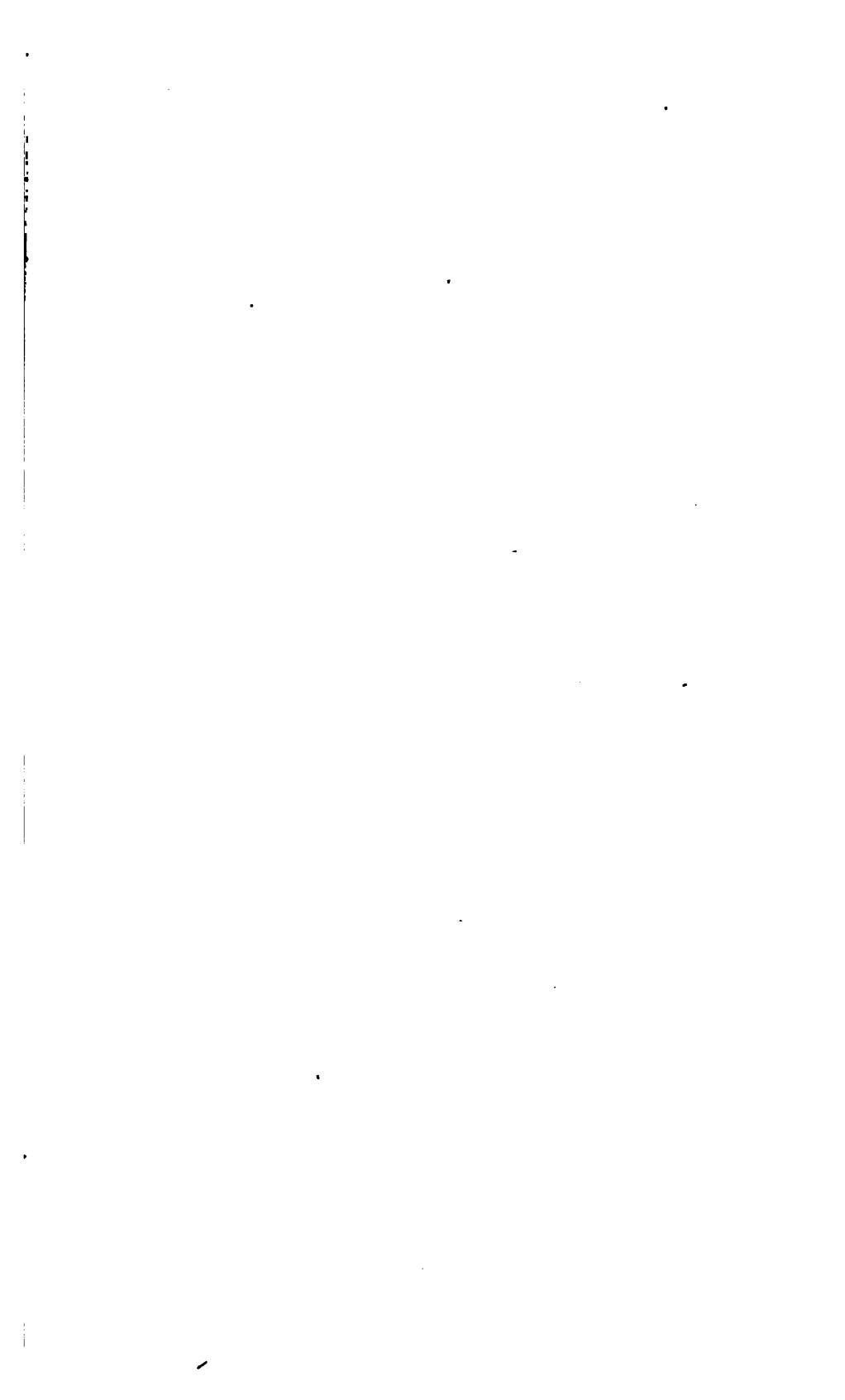
While the former proceeding may not be a bar to the proceeding now instituted, it appears to me that the reasons given for the decision made in the former case are controlling upon the questions now presented. That case was reviewed not only by this court, but by the Supreme Court of the United States, in which it was distinctly held that the provisions of the acts of 1885 and 1887, under which a plan was adopted for an electrical underground subway under the control of the commissioners, was a proper police regulation which the legislature had the power to provide, and that those acts applied to and were binding upon the relator. (*People ex rel. N. Y. Elec. Lines Co. v. Squire*, 1 N. Y. S. R. 363; 6 N. Y. S. R. 281; 107 N. Y. 593; 145 U. S. 175.)

It consequently follows that the relator must comply with the provisions of those statutes, and with the plans adopted for the placing of electrical conductors under ground and that the courts will not, by mandamus, interfere with the judgment and discretion of the commissioner, who, under the statute, is given the power to determine whether such a permit as is here prayed for should be granted.

The order should be affirmed, with costs.

EDWARD T. BARTLETT and VANN, JJ., concur with CHASE, J.; HAIGHT, J., concurs in result in opinion, and WERNER, J., concurs in result; CULLEN, Ch. J., and GRAY, J., take no part.

Order affirmed.



# MEMORANDA

OF

## *DECISIONS RENDERED DURING THE PERIOD EMBRACED IN THIS VOLUME.*

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**THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TRAVELERS' INSURANCE COMPANY, Appellant, v. OTTO KELSEY, as Comptroller of the State of New York, Respondent.**

*People ex rel. Travelers' Ins. Co. v. Kelsey*, 116 App. Div. 910, affirmed.  
(Argued February 18, 1907; decided March 5, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 19, 1906, which confirmed a determination of the defendant in auditing and stating a state tax against the relator for the privilege of carrying on its business within the state.

*David B. Hill, Andrew Hamilton and Neile F. Towner* for appellant.

*William S. Jackson, Attorney-General (George P. Decker of counsel)*, for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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**THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Appellant, v. OTTO KELSEY, as Comptroller of the State of New York, Respondent.**

*People ex rel. Connecticut Mut. L. Ins. Co. v. Kelsey*, 116 App. Div. 97, affirmed.

(Argued February 18, 1907; decided March 5, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the third judicial department, entered

November 26, 1906, which confirmed a determination of the defendant denying an application of the relator for a revision of an assessment for taxes against it imposed for the privilege of carrying on its business within the state.

*George J. Hatt, 2d, for appellant.*

*William S. Jackson, Attorney-General (George P. Decker of counsel), for respondent.*

Order affirmed, with costs, on opinion of CHESTER, J., below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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In the Matter of the Accounting of TITLE GUARANTEE AND TRUST COMPANY et al., as Executors of JAMES J. McCOMB, Deceased, Respondents.

FANNY McCOMB HERZOG et al., Appellants.

*Matter of Title Guarantee & Trust Co., 114 App. Div. 778, affirmed.  
(Argued February 18, 1907; decided March 5, 1907.)*

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 24, 1906, which reversed a decree of the Westchester County Surrogate's Court disallowing certain items in the accounts of the executors herein.

*Robert L. Harrison and Robert W. B. Elliott for appellants.*

*George A. Strong for respondents.*

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

In the Matter of the Accounting of LOUIS A. WAGNER, as Executor of FRELOVE E. O'BRIEN, Deceased, Appellant.

EMILY M. C. Wood, Respondent.

*Matter of Wagner*, 115 App. Div. 900, affirmed.

(Argued February 19, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 23, 1906, which affirmed a decree of the New York County Surrogate's Court disallowing certain items in the accounts of the executor herein.

*Fred. W. Hinrichs* for appellant.

*Henry H. Man* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. ALBAN GLEITSMAN, Appellant, v. EDSON LEWIS, as Police Commissioner of the City of Mount Vernon, Respondent.

*People ex rel. Gleitsman v. Lewis*, 112 App. Div. 889, affirmed.

(Submitted February 19, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 17, 1906, which affirmed a determination of the defendant in removing the relator from the police force of the city of Mount Vernon.

*Sydney A. Syme* for appellant.

*David Swits* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, HAIGHT, WERNER and CHASE, JJ. Dissenting: EDWARD T. BARTLETT and VANN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JESSIE S. JARDINE, Individually and as Trustee under the Will of GEORGE E. JARDINE, Deceased, Respondent, v. EDWARD F. BRUSH, as Mayor of the City of Mount Vernon, et al., Appellants.

*People ex rel. Jardine v. Brush*, 115 App. Div. 688, affirmed.  
(Argued February 19, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 4, 1906, which reversed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to cancel and discharge a certain assessment against property of the relator and granted such motion.

*David Swits* for appellants.

*Charles P. Cowles* and *Justus A. B. Cowles* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BAETLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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EMILY F. THYSON, Appellant, v. FREDERICK C. THYSON et al.,  
Appellants.

MEYER GOLDBERG et al., Respondents.

*Thyson v. Thyson*, 114 App. Div. 911, affirmed.  
(Argued February 19, 1907; decided March 5, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of Special Term denying a motion to compel the respondents herein to complete their purchase of certain real property sold to them at a partition sale.

*John R. Farrar, Peter Cook and Frederick L. Drescher*  
for appellants.

*Philip S. Dean* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,  
HAIGHT, VANN, WERNER and CHASE, JJ.

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**PORTER D. SMITH**, as Administrator of the Estate of **AMY A. SMITH**, Deceased, Respondent, *v. LEHIGH VALLEY RAILROAD COMPANY*, Appellant.

*Smith v. Lehigh Valley R. R. Co.*, 112 App. Div. 903, affirmed.

(Argued February 22, 1907; decided March 5, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 23, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*James McCormick Mitchell* for appellant.

*Thomas Raines* for respondent.

*Per Curiam.* Inasmuch as the plaintiff, individually, is only entitled to a share of the proceeds of the recovery, the case is distinguishable from that of *O'Shea v. Lehigh Valley R. R. Co.* (79 App. Div. 254), and the question as to whether there could be a recovery for the benefit of the other members of the decedent's family is not raised by the request to charge "that if the carelessness or negligence of the plaintiff contributed in any degree, however slight, to cause the accident, the jury must find a verdict for the defendant of no cause of action." As to the question discussed in the *O'Shea* case we express no opinion.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN and CHASE, JJ., concur; WERNER, J., not sitting.

Judgment affirmed.

HARRY T. GAUSE, on Behalf of Himself and Certain Other Creditors of the COMMONWEALTH TRUST COMPANY, Appellant, v. GEORGE C. BOLDT et al., Defendants, and THOMAS J. HALLOWELL et al., Respondents.

*Gause v. Boldt*, 115 App. Div. 897, affirmed.

(Argued February 26, 1907; decided March 5, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 5, 1906, which affirmed a judgment of Special Term sustaining demurrers to the complaint in an action to establish a claim against the Commonwealth Trust Company and to enforce the statutory liability of its stockholders therefor.

*Howard Taylor* for appellant.

*D. Cady Herrick, Francis S. Hutchins and Frederick W. Garvin* for Commonwealth Trust Company et al., respondents.

*Yorke Allen* for Arthur H. Hagemeyer, respondent.

*William M. Bennett* for Thomas J. Hallowell et al., respondents.

*Per Curiam.* The trust company not having been dissolved and being subject to suit it was necessary for the plaintiff to obtain a judgment upon his claim against it before bringing an action against its stockholders to enforce any liability on account of such claim. (Banking Law, § 162.) We do not deem it necessary or expedient at this time to express any opinion upon the effect of the other requirements of said statute which have been more or less discussed by counsel.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment affirmed.

JOHN C. CASSIDY, as Trustee for CASSIDY & SON MANUFACTURING COMPANY, et al., Respondents, v. CHARLES SAUER et al., Defendants, and WALTER A. PARCE et al., Appellants.

**APPEAL—AFFIRMANCE OF JUDGMENT OVERRULING DEMURRER—LEAVE TO PLEAD OVER.** Where an order of the Appellate Division affirming an interlocutory judgment overruling a demurber to the complaint grants leave to plead over conditionally, the affirmance of the order by the Court of Appeals carries with it an affirmance of such leave, and express permission by that court to withdraw the demurber and interpose an answer is unnecessary.

(Submitted February 18, 1907; decided March 5, 1907.)

**MOTION to amend remittitur.** (See 187 N. Y. 540.)

*Lewis & McKay* for motion.

*Satterlee, Bissell, Taylor & French* opposed.

*Per Curiam.* The defendants Parce and Becker were permitted by the Appellate Division in the fourth department to appeal to the Court of Appeals from an order affirming an interlocutory judgment which overruled their demurrers to the complaint. Three questions were certified to the Court of Appeals in the order of the Appellate Division allowing the appeal. This court has affirmed the order of the Appellate Division, with costs, and answered the questions certified. The appellants now move to amend the remittitur so as to permit them to withdraw their demurrers and serve answers upon payment of costs. This motion is unnecessary, in view of the character and contents of the order of the Appellate Division which has been affirmed here. That order in the same paragraph which affirms the interlocutory judgment grants leave to the demurring defendants to plead over upon payment of the costs of the demurrer and costs of the appeal to the Appellate Division. This court having affirmed the order of the Appellate Division in all respects, the provision thereof granting leave to plead over remains in force the same as the rest of the order. The affirmance here being with costs the effect of the proceedings on appeal in this action is (1) that the appellants must pay the costs of the appeal in this court;

and (2) that upon payment of the costs of the demurrer and of the appeal to the Appellate Division within twenty days after the filing of the remittitur from this court they will be entitled to withdraw their demurrers and interpose answers if so advised.

Where an order of the Appellate Division affirming an interlocutory judgment overruling a demurrer to the complaint grants leave to plead over conditionally the affirmance of such an order in this court carries with it an affirmation of such leave to plead over; and it is not necessary under such circumstances that any express leave to withdraw the demurrer and interpose an answer should be granted by the Court of Appeals.

For these reasons the motion should be denied, but without costs.

CULLEN, Ch. J., EDWARD T. BAETLETT, HAIGHT, VANN, WERNER, WILLARD BAETLETT and HISCOCK, JJ., concur.

Motion denied.

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OLIVIA ODELL, as Administratrix of the Estate of WILLIAM H. ODELL, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*Odell v. N. Y. C. & H. R. R. Co.*, 113 App. Div. 906, affirmed.  
(Argued February 1, 1907; decided March 12, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 14, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*Robert Wilkinson* for appellant.

*Robert H. Barnett* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: VANN, WERNER, WILLARD BAETLETT and CHASE, JJ. Dissenting: CULLEN, Ch. J., and HAIGHT, J. Not sitting: GRAY, J.

In the Matter of AMBROSE E. SMITH, Respondent, v. SIDNEY H. COOK, Appellant.

*Matter of Smith v. Cook*, 116 App. Div. 665, affirmed.

(Argued February 20, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 11, 1907, which affirmed an order of Special Term directing Sidney H. Cook to deliver to Ambrose E. Smith all of the books and papers in his possession appertaining to the office of supervisor of the town of Camillus.

*Thomas Woods* for appellant.

*George H. Bond* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARGARET WEICK, Appellant, v. WARDEN OF THE CITY PRISON OF THE CITY OF NEW YORK, Respondent.

*People ex rel. Weick v. Warden City Prison*, 117 App. Div. 154, affirmed.

(Argued February 20, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1907, which affirmed an order of Special Term dismissing a writ of habeas corpus and remanding the relator to custody.

*Edward Hynes and Michael Schaap* for appellant.

*William Travers Jerome, District Attorney (Robert C. Taylor of counsel)*, for respondent.

Order affirmed, on opinion of INGRAHAM, J., below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

**HARRY G. SOPER, Respondent, v. THE ASSOCIATED PRESS,  
Appellant.**

*Soper v. Associated Press*, 115 App. Div. 815, affirmed.  
(Argued February 20, 1907; decided March 12, 1907.)

**APPEAL**, by permission, from a judgment entered November 20, 1906, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for libel.

The following question was certified : "Does the complaint state facts sufficient to constitute a cause of action?"

*James McCormick Mitchell* and *Edward Hance Letchworth* for appellant.

*H. B. Butterfield* for respondent.

Judgment affirmed, with costs ; question certified answered in the affirmative ; no opinion.

Concur: EDWARD T. BARTLETT, VANN, WERNER and CHASE, JJ. Dissenting: CULLEN, Ch. J., GRAY and HAIGHT, JJ.

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**In the Matter of the Application of the MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK Relative to  
Opening Lorillard Place from Third Avenue to Pelham  
Avenue.**

**THE BETH EDEN BAPTIST CHURCH, Appellant; CHARLES A.  
TATUM, Respondent.**

*Matter of Mayor, etc., of N. Y. (Lorillard Place)*, 114 App. Div. 904, affirmed.

(Argued February 20, 1907; decided March 12, 1907.)

**APPEAL** from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1906, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment in the above-entitled proceeding.

*Richard Krause* for appellant.

*Frank H. Edmunds* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. A. G. HYDE & SONS, Respondents, v. FRANK A. O'DONNEL et al., as Commissioners of Taxes and Assessments of the City of New York, Appellants.

*People ex rel. Hyde & Sons v. O'Donnell*, 116 App. Div. 161, affirmed.  
(Argued February 20, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 7, 1906, which affirmed an order of Special Term sustaining a writ of certiorari and reducing an assessment for taxation against the capital stock of the relator.

*William B. Ellison*, Corporation Counsel (George S. Coleman and Curtis A. Peters of counsel), for appellants.

*James J. Allen* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT and WERNER, JJ. Dissenting: HAIGHT and CHASE, JJ. Not voting: VANN, J.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. INTERNATIONAL BANKING CORPORATION, Appellant, v. FRANK RAYMOND et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

*People ex rel. International Banking Corp. v. Raymond*, 117 App. Div. 62, affirmed.  
(Argued February 21, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered Jan-

uary 11, 1907, which affirmed an order of Special Term confirming an assessment for taxation against the capital of the relator invested in business in this state.

*David Rumsey* for appellant.

*William B. Ellison, Corporation Counsel (Curtis A. Peters and George S. Coleman of counsel)*, for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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**OLIVER R. ARKENBURGH, Respondent, v. ROBERT H. ARKENBURGH, Appellant.**

*Arkenburgh v. Arkenburgh*, 114 App. Div. 486, 913, affirmed.  
(Submitted February 21, 1907; decided March 12, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of Special Term denying a motion to vacate an order directing a sale of attached property.

The following question was certified:

“Whether, upon the said record, the Supreme Court had power under section 708 of the Code of Civil Procedure or otherwise to direct the sheriff to sell, under an execution in this action issued, the personal property attached under the warrant of attachment issued therein, including the judgment recovered in the action in aid of the attachment or the claim embraced therein.”

*Charles Edward Souther* for appellant.

*Robert Forsyth Little* for respondent.

Order affirmed, with costs; question certified answered in the affirmative; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

In the Matter of THE BROOKLYN UNION ELEVATED RAILROAD COMPANY, Respondent, *v.* JAMES H. OLIFF et al., Appellants.

*Matter of Brooklyn Union Elevated R. R. Co.*, 118 App. Div. 817, affirmed.

(Argued February 21, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 26, 1906, which affirmed an order of Special Term confirming the report of commissioners of appraisal appointed to assess the fee damage occasioned abutting owners by reason of the construction of petitioner's elevated railroad.

*Cyrus V. Washburn and George W. Sickels* for appellants.

*Charles L. Woody and George D. Yeomans* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

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ORLANDO F. THOMAS, as Receiver of the GENERAL CARRIAGE COMPANY, Appellant, *v.* ELECTRIC VEHICLE COMPANY, Respondent.

*Thomas v. Electric Vehicle Co.*, 98 App. Div. 627, affirmed.

(Argued February 22, 1907; decided March 12, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 23, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action for conversion.

*Herbert C. Smyth and Richard A. Irving* for appellant.

*Edward J. Gavegan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and CHASE, JJ.

**MARGARET E. McAULEY, as Administratrix of the Estate of HUGH McAULEY, Deceased, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.**

*McAuley v. N. Y. C. & H. R. R. Co.*, 112 App. Div. 906, affirmed.  
(Argued February 22, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 10, 1906, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by the defendant's negligence.

*Andrew J. Nellis* for appellant.

*William P. Rudd* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WERNER, JJ. Not sitting: GRAY and CHASE, JJ.

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**THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. BURT C. BROWN, Respondent.**

*People v. Brown*, 110 App. Div. 490, affirmed.  
(Argued February 25, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 17, 1906, which reversed a judgment of the Herkimer County Court rendered upon a verdict convicting the defendant of the crime of arson in the third degree.

*George W. Ward* for appellant.

*A. M. Mills* and *H. A. De Coster* for respondent.

Order affirmed on the first two grounds stated in the prevailing opinion below.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOOK, J.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
ALONZO J. WHITEMAN, Appellant.

*People v. Whiteman*, 118 App. Div. 921, affirmed.  
(Argued February 25, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 7, 1906, which affirmed a judgment rendered at a Trial Term upon a verdict convicting the defendant of the crime of grand larceny in the first degree.

*Charles J. Bissell* for appellant.

*John W. Ryan* and *Frank A. Abbott* for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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JOSEPH BROWN, as Administrator of the Estate of WILLIAM BROWN, Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*Brown v. N. Y. C. & H. R. R. Co.*, 112 App. Div. 901, affirmed.  
(Argued February 26, 1907; decided March 12, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 10, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's

intestate alleged to have been caused by the defendant's negligence.

*Henry Purcell* for appellant.

*Delos M. Cosgrove* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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CHARLES McMANUS, an Infant, by ALICE McMANUS, His Guardian ad Litem, Respondent, v. ST. REGIS PAPER COMPANY, Appellant.

*McManus v. St. Regis Paper Co.*, 112 App. Div. 908, affirmed.  
(Argued February 26, 1907; decided March 12, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 28, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Henry Purcell* for appellant.

*N. F. Breen* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

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ALICE P. WARE, as Administratrix of the Estate of TILDEN H. WARE, Deceased, Respondent, v. ITHACA STREET RAILWAY COMPANY, Appellant.

*Ware v. Ithaca Street Ry. Co.*, 110 App. Div. 923, appeal dismissed.  
(Submitted March 6, 1907; decided March 12, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered

January 20, 1906, which affirmed an order of Special Term setting aside a verdict in favor of defendant and granting a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*E. A. Denton* for appellant.

*David M. Dean* and *Peter F. McAllister* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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HUGH K. PEACE, Respondent, *v.* JAMES G. WILSON et al.,  
Appellants.

(Submitted December 10, 1906; decided March 12, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 186 N. Y. 403.)

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JULIA A. DEEGAN, as Administratrix of the Estate of THOMAS E. DEEGAN, Deceased, Appellant, *v.* SYRACUSE LIGHTING COMPANY, Respondent.

*Deegan v. Syracuse Lighting Co.*, 111 App. Div. 908, affirmed.

(Argued February 27, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 15, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence.

*Charles E. Spencer* for appellant

*Ernest I. White* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN and WERNER, JJ. Not voting: WILLARD BARTLETT, J. Not sitting: HISCOCK, J.

S. AUGUSTA HULL, as Administratrix of the Estate of EDGAR G. HULL, Deceased, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*Hull v. N. Y. C. & H. R. R. Co.*, 113 App. Div. 888, affirmed.  
(Argued February 28, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of the plaintiff's intestate, alleged to have been caused by defendant's negligence.

*Frederick Collin and John B. Stanchfield* for appellant.

*William S. Moore* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WEEVER, WILLARD BARTLETT and HISCOCK, JJ.

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PATRICK LARKIN, Appellant, *v.* JOHN McNAMEE, as Executor of EDWARD GORMAN, Deceased, et al., Respondents, Impleaded with Others.

*Larkin v. McNamee*, 109 App. Div. 884, affirmed.  
(Argued February 28, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 17, 1906, affirming a judgment in favor of the executor defendant entered upon a verdict directed by the court in an action under section 2653a of the Code of Civil Procedure to test the validity of the probate of the will of Edward Gorman, deceased.

*John R. Kuhn* for appellant.

*Herbert T. Ketcham and Joseph E. Owens* for John McNamee, as executor, respondent.

*Walter G. Rooney* for Margaret Burns, respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

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GEORGE A. MAKIN, an Infant, by HELEN E. MAKIN, His Guardian ad Litem, Respondent, *v.* THE PETTEBONE CATARACT PAPER COMPANY, Appellant.

*Makin v. Pettebone Cataract Paper Co.*, 111 App. Div. 726, affirmed.

(Argued February 28, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 20, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Maulsby Kimball* for appellant.

*Robert H. Gittins* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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GORDON RYAN, as Administrator of FREDERICK RYAN, Deceased, Respondent, *v.* THE DELAWARE AND HUDSON COMPANY, Appellant.

*Ryan v. Delaware & Hudson Co.*, 114 App. Div. 268, affirmed.

(Argued March 1, 1907; decided March 15, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 2, 1906, which reversed a judgment in favor of defendant

entered upon a dismissal of the complaint by the court at a Trial Term and granted a new trial in an action to recover for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence.

*Lewis E. Carr* for appellant.

*George B. Wellington* and *James A. Burnham* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts, on the ground that the sufficiency of defendant's rules was a question of fact for the jury; no opinion.

Concur: *CULLEN*, Ch. J., *EDWARD T. BARTLETT*, *HAIGHT*, *VANN*, *WERNER*, *WILLARD BARTLETT* and *HISCOCK*, JJ.

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**MARY A. BLANCK**, Respondent, *v. CHARLES M. PRESTON*, as Receiver of NEW YORK BUILDING-LOAN BANKING COMPANY, Appellant.

*Blanck v. Preston*, 118 App. Div. 911, affirmed.  
(Argued March 1, 1907; decided March 15, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 7, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract.

*Alfred Hayes, Jr.*, and *Charles W. Dayton, Jr.*, for appellant.

*Edgar V. Frothingham* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *CULLEN*, Ch. J., *EDWARD T. BARTLETT*, *HAIGHT*, *VANN*, *WERNER*, *WILLARD BARTLETT* and *HISCOCK*, JJ.

JOSEPH C. PILLMAN et al., Respondent, v. C. EDWARD BILLQVIST et al., Appellants, Impleaded with Another.

(Submitted March 11, 1907; decided March 15, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 187 N. Y. 551.)

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. GAETANO GIANVECCHIO, Appellant.

*People v. Gianvecchio*, 113 App. Div. 908, affirmed.

(Argued March 4, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1906, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of the crime of forgery in the second degree.

*Rosario Maggio* for appellant.

*Williams Travers Jerome*, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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MARY C. BURKE, as Executrix of THOMAS P. BURKE, Deceased, Respondent, v. JOSEPH F. BAKER et al., Appellants, Impleaded with Another.

EVIDENCE — SELF-SERVING DECLARATIONS. In an action to recover for services alleged to have been rendered by plaintiff's testator to the defendants, the admission in evidence of certain entries in diaries of the testator relating to such alleged services is erroneous since they must be regarded as self-serving declarations and are clearly inadmissible.

*Burke v. Baker*, 111 App. Div. 422, affirmed.

(Argued March 4, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 6, 1906, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought to recover for legal services alleged to have been rendered to the defendants by the plaintiff's testator.

*David B. Hill, Nelson Smith and Willard U. Taylor* for appellants.

*Thomas F. Magner and John F. Carew* for respondent.

*Per Curiam.* The unanimous decision of the Appellate Division that there is evidence supporting or tending to sustain the findings of fact leaves open in this court the single question whether the findings support the conclusions of law. An inspection of the findings leads to the conclusion that this question must be answered in the affirmative.

A further question is raised by objection and exception to the admission in evidence of certain entries in the diaries of Thomas P. Burke, the plaintiff's testator, relating to services alleged to have been rendered by him to the defendants. The learned trial judge ruled as follows: "I will permit the entries for the purpose of showing his connection with the course of the litigation." These entries must be regarded as self-serving declarations and clearly inadmissible.

We have reached the conclusion, however, after an examination of the evidence that their admission is not to be regarded as prejudicial error. There is evidence in the record, apart from that contained in the diaries, warranting the findings that Thomas P. Burke, the plaintiff's testator, was employed by the defendants and rendered legal services as therein set forth in detail.

The judgment appealed from should be affirmed, with costs.

GRAY, EDWARD T. BARTLETT, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur; CULLEN, Ch. J., and HAIGHT, J., dissent on the ground that the admission of the diary of plaintiff's testator was fatal error.

Judgment affirmed.

**HEDWIG HACKER, as Administratrix of the Estate of JULIUS HACKER, Deceased, Respondent, v. O'ROURKE ENGINEERING CONSTRUCTION COMPANY, Appellant.**

*Hacker v. O'Rourke Eng. & Constr. Co.*, 115 App. Div. 898, affirmed.  
(Argued March 4, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 8, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*Theodore H. Lord* for appellant.

*Charles Steckler and Levin L. Brown* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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**FRANK P. KENDALL, Respondent, v. GERTRUDE CARNICK, as Executrix of JOHN CARNEICK, Deceased, Appellant.**

*Kendall v. Carnick*, 114 App. Div. 901, affirmed.  
(Argued March 5, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 23, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover for an alleged breach of contract.

*Benjamin N. Cardozo* for appellant.

*Edwin Countryman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

EUGENE J. COLEMAN et al., as Administrators of the Estate of JAMES COLEMAN, Deceased, Appellants, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

*Coleman v. N. Y. C. & H. R. R. Co.*, 112 App. Div. 902, affirmed.  
(Argued March 5, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 22, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiffs' intestate alleged to have been caused by defendant's negligence.

*Daniel V. Murphy* for appellants.

*Charles A. Pooley* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY and HISCOCK, JJ.

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JOHN SCHEEL, an Infant, by HENRY SCHEEL, His Guardian ad Litem, Appellant, *v.* MUTUAL MILK AND CREAM COMPANY, Respondent.

*Scheel v. Mutual Milk & Cream Co.*, 114 App. Div. 920, affirmed.  
(Argued March 5, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 6, 1906, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*M. S. Bevins, Frank V. Johnson and Jacob C. Brand* for appellant.

*R. B. Wood, George Gordon Battle and Frederick E. Fishel* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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ROBERT A. PELIN, as Administrator of the Estate of ERNEST D. PELIN, Deceased, Respondent, *v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY*, Appellant.

*Pelin v. N. Y. C. & H. R. R. Co.*, 115 App. Div. 883, affirmed.  
(Argued March 5, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 4, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*Henry Purcell* for appellant.

*D. C. Morehouse and L. C. Rowe* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY and HISCOCK, JJ.

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CASSANDRA H. DUDLEY, Respondent, *v. FIFTH AVENUE TRUST COMPANY*, as Executor of AUGUSTUS P. DUDLEY, Deceased, Appellant.

*Dudley v. Fifth Ave. Trust Co.*, 115 App. Div. 896, affirmed.  
(Argued March 6, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

December 5, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to set aside an assignment heretofore made by plaintiff of her interest in a policy of life insurance upon the life of the deceased.

*Eldon Bisbee* for appellant.

*Leland S. Stillman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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HENRY R. KENT, as Executor and Trustee under the Will of JOHN DICKINSON, Deceased, Appellant, *v.* A. WARNER SHEPARD, Respondent.

*Kent v. Shepard*, 115 App. Div. 64, affirmed.  
(Argued March 6, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 18, 1906, in favor of defendant upon the submission of a controversy under section 1279 of the Code of Civil Procedure as to the power and authority of the plaintiff, as executor and trustee under the will of John Dickinson, deceased, to convey certain premises.

*Rastus S. Ransom* and *Charles A. Clark* for appellant.

*Frank B. York* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

In the Matter of the Accounting of EDWARD MITCHELL et al., as Executors of BENJAMIN D. SILLIMAN, Deceased, Appellants.

CAROLINE S. TAYLOR et al., Respondents.

*Matter of Mitchell*, 115 App. Div. 904, affirmed.  
(Argued March 6, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 16, 1906, which affirmed a decree of the Kings County Surrogate's Court settling the accounts of the executors herein.

*John M. Bowers* and *William Mitchell* for appellants.

*Edmund L. Baylies* and *David H. M. Weynberg* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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In the Matter of the Probate of the Will of HARVEY N. DE WITT, Deceased.

ROBERT H. CLARK, as Executor, Appellant; LILLIE M. DE WITT, Respondent.

*Matter of De Witt*, 118 App. Div. 790, affirmed.  
(Submitted March 8, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1906, which modified and affirmed as modified a decree of the Orange County Surrogate's Court admitting to probate a paper propounded as the will of Harvey N. De Witt, deceased.

*John F. Halstead* for appellant.

*John A. Kemp* for respondent.

Order affirmed, with costs, on opinion below.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

FRANCES MORRIS et al., as Executors of JOACHIM DE COMPS,  
Deceased, Appellants, v. THEOPHILUS WUCHER, Respondent.

*Morris v. Wucher*, 115 App. Div. 278, affirmed.

(Argued March 8, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 21, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover money alleged to have been loaned.

*Simon Sultan* for appellants.

*Paul Fuller, Jr.*, and *Frederic R. Coudert* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: CULLEN, Ch. J., and CHASE, JJ.

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TOWN OF EAST FISHKILL, Respondent, v. TOWN OF WAPPINGER,  
Appellant.

*Town of East Fishkill v. Town of Wappinger*, 107 App. Div. 622, affirmed.  
(Submitted March 11, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 19, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action under the provisions of section 135 of the Highway Law to recover one-half the expense of repairing two bridges.

*George Wood* and *C. Morchauser* for appellant.

*C. M. Smalley* and *Charles A. Hopkins* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

JACOB BERNSTEIN, Respondent, *v.* JOHN J. KINNEALLY, as Treasurer of the SOCIALIST LABOR PARTY, et al., Appellants.

*Bernstein v. Kinneally*, 118 App. Div. 905, affirmed.

(Argued March 11, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 29, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action for libel.

*Benjamin Patterson* for appellants.

*Nathan Burkan* for respondent.

Judgment affirmed, with costs ; no opinion.

Concur : CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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ROSE FREY, Appellant, *v.* FRANCINE FOUGERA et al., as Administratrices of the Estate of CECILE L. FOUGERA, Deceased, Respondents.

*Frey v. Fougera*, 118 App. Div. 912, affirmed.

(Submitted March 11, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 7, 1906, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to determine the right to a portion of the proceeds of a sale in partition.

*James C. de La Mare* for appellant.

*George W. Broderick* and *Charles F. Brandt* for respondents.

Judgment affirmed, with costs ; no opinion.

Concur : CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Dissenting : HISCOCK, J.

FRED MYERS, Appellant, *v.* TOWN OF GATES, Respondent.

*Myers v. Town of Gates*, 111 App. Div. 909, affirmed.  
(Argued March 12, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 18, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Philetus Chamberlain and Albert L. Shepard* for appellant.

*George P. Decker* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, Hiscock and CHASE, JJ.

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ABNER J. HAYDEL, Respondent, *v.* HOWARD GOULD, Appellant.

*Haydel v. Gould*, 113 App. Div. 913, affirmed.  
(Argued March 12, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for services alleged to have been rendered pursuant to a written contract.

*William Pierrepont Williams* for appellant.

*Robert Thorne* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, Hiscock and CHASE, JJ.

**HENRY H. PERSONS et al., as Receivers of the BANK OF COMMERCE IN BUFFALO; Respondents, v. WILLIAM H. GARDNER et al., Appellants, and ROBERT R. HEFFORD et al., Respondents.**

*Persons v. Gardner*, 118 App. Div. 597, affirmed.  
(Argued March 12, 1907; decided April 2, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 11, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at an Equity Term in an action against stockholders of a bank to recover a deficiency in its assets.

*Adelbert Moot* for appellants.

*Edward R. Bosley* for plaintiffs, respondents.

*George Wadsworth* for defendants, respondents.

Judgment affirmed, with costs, on opinion of WILLIAMS, J., below.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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**J. NOYES SHAUGHNESSY, Respondent, v. ARTHUR D. WEEKES, Appellant.**

*Shaughnessy v. Weekes*, 111 App. Div. 918, affirmed.  
(Submitted March 13, 1907; decided April 2, 1907.)

**APPEAL** from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 20, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for services alleged to have been rendered by a real estate broker in procuring the sale of real property.

*Edgar M. Leventritt and Henry A. Forster* for appellant.

*J. Culbert Palmer* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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GEORGE H. NEIDLINGER, Respondent, *v.* WILLIAM E. D. STOKES, Appellant.

*Neidlanger v. Stokes*, 107 App. Div. 624, affirmed.

(Argued March 18, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 8, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action against a surety to recover for a breach of contract by his principal.

*Ernest Hall, John C. Fisher, Hiram R. Fisher and Albert H. Gleason* for appellant.

*Frank Harvey Field, R. Percy Chittenden and Walter Lester Glenney* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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GEORGE H. NEIDLINGER, Respondent, *v.* THE ONWARD CONSTRUCTION COMPANY, Appellant.

*Neidlanger v. Onward Constr. Co.*, 107 App. Div. 398, affirmed.

(Argued March 18, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

May 8, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover on contracts for labor and materials alleged to have been furnished.

*Ernest Hall, John C. Fisher, Hiram R. Fisher and Albert H. Gleason* for appellant.

*Frank Harvey Field, R. Percy Chittenden and Walter Lester Glenney* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
CHARLES M. COLMEY, Appellant.

*People v. Colmey*, 117 App. Div. 462, affirmed.  
(Argued March 14, 1907; decided April 2, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 8, 1907, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York, rendered upon a verdict convicting the defendant of the crime of grand larceny in the first degree.

*Clark L. Jordan and Charles Lex Brooke* for appellant.

*William Travers Jerome, District Attorney (E. Crosby Kindleberger of counsel)*, for respondent.

Judgment of conviction affirmed; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

JOHN K. CULLIN, Appellant, *v.* WILLIAM J. ALVORD, as Sheriff of Columbia County, Respondent, Impleaded with Another.

*Cullin v. Alvord*, 111 App. Div. 911, affirmed.  
(Argued March 14, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 13, 1906, affirming a judgment in favor of defendant entered upon the report of a referee in an action of replevin to recover possession of personal property taken under a warrant of attachment.

*J. Newton Fiero and A. Frank B. Chase* for appellant.

*John L. Crandell* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WILLARD BARTLETT and Hiscock, JJ. Not voting: WERNER, J. Not sitting: CHASE, J.

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EMMA F. LATUREN, Appellant, *v.* BOLTON DRUG COMPANY, LIMITED, Respondent.

*Laturen v. Bolton Drug Co.*, 112 App. Div. 921, affirmed.  
(Argued March 14, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 28, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence in filling a prescription.

*James Taylor Lewis* and *Edmund Fletcher Driggs* for appellant.

*Edwin A. Jones* and *Charles C. Nadal* for respondent.

Judgment affirmed, with costs, on the sole ground that the plaintiff did not show that her injuries were the result of defendant's mistake in changing the prescription; no opinion.

Concur: GRAY, WERNER, HISCOCK and CHASE, JJ. Dissenting: CULLEN, Ch. J., VANN and WILLARD BARTLETT, JJ.

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**GEORGE A. L'HOMMEDIEU et al., Appellants, v. ROBERT D. WINTHROP, Respondent.**

*L'Hommedieu v. Winthrop*, 97 App. Div. 637, affirmed.  
(Submitted March 14, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 14, 1904, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court in an action to recover a balance alleged to be due on a building contract.

*Harrison S. Moore* and *Clinton B. Smith* for appellants.

*Henry W. Taft* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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**HARRY GLEICH, Respondent, v. CHARLES A. COBB, as Administrator of the Estate of JACOB L. COBB, Deceased, Appellant.**

*Gleich v. Cobb*, 110 App. Div. 918, affirmed.  
(Submitted March 14, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 6, 1906, affirming a judgment in favor of plaintiff

entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract to convey real property.

*George V. Brower* for appellant.

*Herman G. Loew* and *George Tonkonogy* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, HISCOCK and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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**JAMES SNYDER**, Appellant, *v. MONROE ECKSTEIN BREWING COMPANY*, Respondent, Impleaded with Others.

*Snyder v. Monroe Eckstein Brewing Co.*, 107 App. Div. 328, affirmed.  
(Submitted March 15, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 20, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien.

*Henry W. Rianhard* for appellant.

*William D. Gaillard* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOOK and CHASE, JJ.

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**BARRETT CHEMICAL COMPANY**, Appellant. *v. JULIUS STERN*, Respondent.

*Barrett Chemical Co. v. Stern*, 111 App. Div. 913, affirmed.  
(Argued March 15, 1907; decided April 2, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 2, 1906, affirming a judgment in favor of defendant

entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain the defendant from using certain words in the sale or advertisement of a certain manufactured product as an infringement of plaintiff's trade mark.

*William S. Beaman* for appellant.

*Arthur Furber* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ.

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**JOHN TIERNAN**, Respondent, v. **NORMAN E. MACK**, Appellant.

*Tiernan v. Mack*, 115 App. Div. 921, appeal dismissed.

(Argued April 1, 1907; decided April 9, 1907.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1906, which affirmed an order of Special Term denying a motion to compel the plaintiff to accept the answer served upon him by defendant.

The motion was made upon the ground that the order of the Appellate Division was not appealable and permission to appeal had not been granted.

*Spencer Brownell* for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

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In the Matter of the Appraisal under the Transfer Tax Act of the Estate of **FREDERICK COOK**, Deceased.

**THE COMPTROLLER OF THE STATE OF NEW YORK**, Appellant and Respondent; **FREDERICK C. MACDONALD et al.**, Respondents and Appellants.

(Submitted April 1, 1907; decided April 9, 1907.)

Motion for re-argument denied, with ten dollars costs.  
(See 187 N. Y. 253.)

In the Matter of the Application of THE TROY PRESS COMPANY, Respondent, for a Writ of Mandamus against ELIAS P. MANN, as County Treasurer of Rensselaer County, Appellant.

(Submitted April 1, 1907; decided April 9, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 187 N. Y. 279.)

EDWARD W. S. JOHNSTON, as Executor of JOSEPH HUGHES, Deceased, Respondent, v. HENRY HUGHES et al., Respondents, and THE SISTERS OF THE POOR OF ST. FRANCIS, Appellant, Impleaded with Another.

(Argued April 1, 1907; decided April 9, 1907.)

MOTION to amend remittitur. (See 187 N. Y. 446.)

*Lewis Johnston* for motion.

*Alfred J. Amend* opposed.

Motion granted, and it is ordered that the remittitur be returned and amended so as to provide as follows: "The judgments of the Appellate Division and the Special Term of the Supreme Court appealed from be and the same are hereby reversed in so far as they adjudge the bequest to the Trustees of the St. Francis Hospital invalid, and judgment ordered for appellant declaring the bequest valid, with costs payable out of the fund to parties appearing in this court by separate attorneys and filing briefs."

ANNA M. IRWIN et al., Individually and as Executrices of JACOB V. B. TELLER, Deceased, Appellants, v. DAVID TELLER et al., Respondents.

(Submitted March 11, 1907; decided April 9, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 188 N. Y. 25.)

Remittitur so amended as to make the affirmance without prejudice to any application by the appellants for such relief as they may be entitled to as to any mortgage they may have paid on the property.

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WILLIAM E. KRANZ, as Administrator of the Estate of HENRY KRANZ, Deceased, Appellant, v. SOLLIE LEWIS, Respondent.

*Kranz v. Lewis*, 115 App. Div. 106, appeal dismissed.

(Submitted April 1, 1907; decided April 9, 1907.)

MOTION to dismiss an appeal from a final judgment entered December 22, 1906, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer.

The motion was made upon the ground that the judgment and order were not appealable.

*Sol Rothschild and J. Charles Weschler* for motion.

*Jacob Neu* opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

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In the Matter of the Accounting of ANN WILEY et al., as Executors of GEORGE WILEY, Deceased, Respondents.

ELIZA E. ROXBURY, as Administratrix of the Estate of CHARLES W. ROXBURY, Deceased, et al., Appellants; ANN WILEY et al., Respondents.

*Matter of Wiley*, 111 App. Div. 590, reversed.

(Argued February 27, 1907; decided April 9, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1906, which reversed a decree of the New York County Surrogate's Court judicially settling the accounts of

the executors herein and directing distribution of the residuary estate.

*Henry A. Forster, William H. Hamilton, Charles H. Beckett and Warren McConihe* for appellants.

*Robert E. Deyo*, for executors, respondents.

*Francis S. Williams and Clarence L. Barber* for Ann Wiley et al, respondents.

*Per Curiam.* We concur in the dissenting opinion of HOUGHTON, J., in the Appellate Division and reverse the judgment below on the grounds therein stated. We may add that if the construction of the residuary clause adopted by the majority of the Appellate Division were accepted, a question would arise as to the validity of the conditional limitation therein contained as suspending the absolute ownership of personal property and the vesting of real estate during a period not terminable on lives. (*Henderson v. Henderson*, 113 N. Y. 1.) Suspension of the power of alienation is not the only factor in our rule against perpetuities. In *Oxley v. Lane* (35 N. Y. 340), cited by the Appellate Division, it was substantially conceded that if the whole estate was to be divided solely among those who survived to the period of distribution the provision was invalid (p. 349). Such is the construction of the will adopted by the Appellate Division in this case. In *Matter of Denton* (137 N. Y. 428) the several parts of the residuary estate indefeasibly vested either at the death of the testator or at the termination of one life in being thereafter or of two lives in being thereafter and thus in no way contravened the statute.

The judgment of the Appellate Division should be reversed and the decree of the surrogate affirmed, with costs to appellants in both courts, payable out of the estate, on the dissenting opinion of HOUGHTON, J., below.

CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Judgment accordingly.

In the Matter of the Application of the MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Relative to Acquiring Title to Lands Required for the Opening of East 178th Street from Creston Avenue to Ryer Avenue.

CHARLOTTE ASCHENBRENNER, Appellant; THE CITY OF NEW YORK et al., Respondents.

REAL PROPERTY — DEED — EASEMENT OF WAY. Where premises situated on a certain opened street are described in a conveyance thereof as being part of a certain lot on a certain map, which map shows the lot as bounded by the street in question, there is a sufficient recognition of the map to invest the purchaser with an easement of way through the street as shown, even though no street is mentioned in the conveyance.

*Matter of Mayor, etc., of New York*, 114 App. Div. 912, affirmed.

(Argued April 1, 1907; decided April 9, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed an order of the Special Term confirming the report of commissioners of estimate and assessment in the above-entitled proceeding.

*David McClure, John P. Everett, Ellison Crawford and A. A. Greenhout* for appellant.

*Wm. B. Ellison, Corporation Counsel (Theodore Connoly, John P. Dunn and L. Howell La Motte of counsel)*, for City of New York, respondent.

*Henry B. Heylman* for property owners, respondents.

*Per Curiam.* Under the recent decision of this court in *Reis v. City of New York* (188 N. Y. 58), the grantees of the various lots plotted on the map of the Buckhout farm acquired private easements in the streets shown on that map only to the extent of the block in front of their respective lots and such other parts of the streets as might be necessary to obtain access to a public highway. The part of Grove street as delineated on said map, which is the subject of the award in this proceeding, was a mere *cul-de-sac*, and when the appellant's testator, Green, acquired title to the lots on both

sides of this part of Grove street the private easements were extinguished. But when Green conveyed to Lock the premises on the south side of Grove street, though he did not mention that street, he described the premises conveyed as being part of lot 7 on the Buckhout map. This was a recognition of the map, and that map showed lot 7 as bounded on the north by an open street, Grove street. The evidence is conflicting as to whether at the time of the conveyance this part of Grove street was physically open or inclosed, and that question of fact must be assumed to have been decided against the appellant.

We are of opinion, therefore, that the commissioners could properly find that the land condemned was subject to an easement of way in favor of the owner of lot 7, and the order appealed from should be affirmed, with costs.

CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, Hiscock and CHASE, JJ., concur.

Order affirmed.

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SARAH A. BLY, Respondent, *v.* THE EDISON ELECTRIC ILLUMINATING COMPANY OF NEW YORK, Appellant.

*Bly v. Edison Electric Ill. Co.*, 111 App. Div. 170, affirmed.  
(Submitted March 13, 1907; decided April 16, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to restrain the continuance of an alleged nuisance and to recover past damages therefor.

Henry J. Hemmens and J. Haviland Tompkins for appellant.

Frank M. Hardenbrook for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, Hiscock and CHASE, JJ. Dissenting: GRAY, J.

In the Matter of the Application of FRED HARDING,  
Respondent, for a Writ of Habeas Corpus.

GEORGE W. EVANS, Appellant.

*Matter of Harding*, 112 App. Div. 907, affirmed.  
(Argued April 1, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 26, 1906, which affirmed an order of the Ulster County Court discharging the petitioner, a judgment debtor, from custody.

*Charles H. Stage* for appellant.

*Joseph M. Fowler* for respondent.

Order affirmed, with costs; no opinion.

Concur: O'BRIEN, EDWARD T. BARTLETT, HISCOCK and CHASE, JJ. Dissenting: CULLEN, Ch. J., HAIGHT and VANN, JJ.

In the Matter of the Accounting of LOUIS C. TIFFANY et al.,  
as Executors and Trustees under the Will of CHARLES L.  
TIFFANY, Deceased, Respondents.

BURNETT Y. TIFFANY, Appellant.

*Matter of Tiffany*, 114 App. Div. 911, affirmed.  
(Argued April 1, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which affirmed a decree of the New York County Surrogate's Court overruling objections to and settling the accounts of the executors and trustees of Charles L. Tiffany, deceased.

*William H. Page, Gilbert H. Crawford and Benjamin Tuska* for appellant.

*Charles W. Gould and Bayard L. Peck* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

In the Matter of the Estate of FERDINAND HIRSCH, Deceased.  
EDWARD K. JONES, Appellant; MINNIE F. HIRSCH et al.,  
Respondents.

*Matter of Hirsch*, 116 App. Div. 367, affirmed.  
(Argued April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 21, 1906, which affirmed a decree of the New York County Surrogate's Court revoking letters testamentary issued to the appellant herein and removing him as trustee under the will of Ferdinand Hirsch, deceased.

*Alton B. Parker, Edward W. Hatch, David McClure*  
and *Frank B. Church* for appellant.

*Lemuel E. Quigg* and *Charles F. Bostwick* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,  
HAIGHT, HISCOCK and CHASE, JJ. Not voting: VANN, J.

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LOUIS L. COUDERT, as Trustee in Bankruptcy for the Firm of CARLEY, ROSENGARTEN & CARLEY, Appellant, v. SAMUEL M. JARVIS, Respondent.

*Coudert v. Jarvis*, 114 App. Div. 913, affirmed.  
(Submitted April 2, 1907; decided April 16, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 20, 1906, which affirmed an order of Special Term denying a motion to transfer the above-entitled action from the Trial Term to the Special Term calendar.

The following questions were certified:

"I. Whether, on the facts shown by the record herein, the cause of action is one maintainable in equity or at law.

"II. Whether leave should be granted to transfer said

action from the Trial Term of said Court to a Special Term thereof, and the motion asking therefor granted."

*W. Benton Crisp* for appellant.

*Henry Wollman and Achilles H. Kohn* for respondent.

Order affirmed, with costs. First question answered "at law;" second question answered in the negative; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, Hiscock and CHASE, JJ.

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In the Matter of the Application of DOMINICK DALESSANDRO, Appellant, for an Order to Strike from the Enrollment Book of the Sixteenth Election District of the First Assembly District, in the County of New York, the Name of JAMES O'BRIEN.

THE COMMISSIONERS OF THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondents.

In the Matter of the Application of BERNARD GILES, Appellant, for an Order to Strike from the Enrollment Book of the Twentieth Election District of the Twenty-fifth Assembly District, in the County of New York, the Name of HENRY TITUS.

THE COMMISSIONERS OF THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondents.

In the Matter of the Application of LANDON T. DAVIES, Appellant, for an Order to Strike from the Enrollment Book of the Twenty-seventh Election District of the Twenty-fifth Assembly District, in the County of New York, the Name of JOHN MCGUIRE.

THE COMMISSIONERS OF THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, Respondents.

*Matter of O'Brien*, 117 App. Div. 628, affirmed.

*Matter of Titus*, 117 App. Div. 621, affirmed.

*Matter of McGuire*, 117 App. Div. 687, affirmed.

(Argued April 2, 1907; decided April 16, 1907.)

APPEAL in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the

first judicial department, entered February 15, 1907, which affirmed an order of Special Term denying the application therein.

*James H. Hickey* for appellants.

*William B. Ellison, Corporation Counsel (Royal E. T. Riggs and Theodore Connoly of counsel)*, for respondents.

Orders affirmed, without costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE R. ADAMS, Appellant, v. JACOB F. STOLL et al., as Assessors of the Town of Rosendale, Respondents.

*People ex rel. Adams v. Stoll*, 117 App. Div. 914, affirmed.  
(Argued April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered February 4, 1907, which affirmed two orders of Special Term, one dismissing a writ of certiorari and the other denying a motion to strike from the assessment roll of the town of Rosendale certain assessments against relator's real property.

*George R. Adams* appellant in person.

*Howard Chipp and John E. Hardenburg* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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RAYMOND L. HERBERT, Respondent, v. FERNANDO E. DE MURIAS et al., Appellants.

*Herbert v. de Murias*, 115 App. Div. 901, appeal dismissed.  
(Submitted April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

November 16, 1906, which affirmed an order of Special Term denying a motion to vacate an order of arrest granted under subdivision 4 of section 549 of the Code of Civil Procedure.

*Headley M. Greene* for appellants.

*E. Powis Jones, Jr.*, and *Lyman E. Warren* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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In the Matter of the Probate of the Will of JOHANNA DOELGER, Deceased.

GEORGE SCHNEIDER et al., Appellants; CHARLES REINHARDT, Respondent.

*Matter of Doelger*, 118 App. Div. 913, affirmed.  
(Submitted April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1906, which affirmed a decree of the Kings County Surrogate's Court admitting to probate an instrument purporting to be the will of Johanna Doelger, deceased.

*Einar Chrystie* and *John P. Lamerdin* for appellants.

*James C. Cropsey* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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ANNA SEITZ, Appellant, v. MAGDALENA MESSERSCHMITT, Respondent, Impleaded with Others.

*Seitz v. Messerschmitt*, 117 App. Div. 401, affirmed.  
(Submitted April 2, 1907; decided April 16, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered Feb-

ruary 8, 1907, which affirmed an order of Special Term granting the motion of the respondent herein to be relieved of her purchase of real property at a partition sale.

*John F. Frees* and *George Q. Collins* for appellant.

*Joseph T. Weed* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**ANGELO DARIENZA**, as Administrator of the Estate of ANTONIO GUICESSI, Deceased, Appellant, v. NEW YORK CITY RAILWAY COMPANY, Respondent.

(Submitted April 8, 1907; decided April 16, 1907.)

Motion for re-argument denied, with ten dollars costs.  
(See 187 N. Y. 567.)

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM L. LAZENBY, Respondent, v. WILLIAM J. HOMER et al., Constituting the MUNICIPAL CIVIL SERVICE COMMISSION OF THE CITY OF ELMIRA, Appellants.

*Matter of Lazenby v. Municipal Civil Service Commission*, 116 App. Div. 185, affirmed.

(Argued April 8, 1907; decided April 28, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 13, 1906, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to certify to a payroll with the name of the relator thereon.

*John F. Murtaugh* for appellants.

*Richard H. Thurston* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

In the Matter of the Accounting of FREDERICK H. STEVENS et al., as Trustees under the Will of JULIA A. BROOKS, Deceased, Respondents.

CLARE A. PICKARD, as Special Guardian of JESSE B. NICHOLS, Appellant.

*Matter of Stevens*, 114 App. Div. 607, affirmed.

(Argued April 8, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 12, 1906, which reversed that portion of a decree of the Chautauqua County Surrogate's Court granting an allowance to the special guardian of Jesse B. Nichols in the above-entitled proceeding.

*Frank W. Stevens, Benjamin S. Dean and Clare A. Pickard* for appellant.

*George A. Lewis* for respondents.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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In the Matter of the Petition of ALBERT THIERIOT, as Executor of ROSA DELMONICO, Deceased, et al., Appellants, for the Revocation of Letters Testamentary Issued to JOSEPHINE C. DELMONICO, as Executrix of ROSA DELMONICO, Deceased, and for Her Removal as Testamentary Trustee.

JOSEPHINE C. DELMONICO, Respondent.

*Matter of Thieriot*, 117 App. Div. 686, modified.

(Argued April 8, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 25, 1907, which reversed a decree of the New York

County Surrogate's Court granting the above-entitled petition and dismissed the proceeding.

*Solomon Hanford and William T. Houston* for appellants.

*Morgan J. O'Brien and Henry Major* for respondent.

Order of Appellate Division modified so as to direct a rehearing before the surrogate, upon which the issues raised by petition and answer may be tried, and as modified the order is affirmed, without costs in this court to either party; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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In the Matter of FRANCIS J. NEKARDA, an Attorney, Appellant.  
THE BAR ASSOCIATION OF THE CITY OF NEW YORK, Respondent.

*Matter of Nekarda*, 114 App. Div. 370, affirmed.

(Argued April 3, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 12, 1906, which confirmed the report of a referee and disbarred the appellant herein from practice of the profession of attorney and counselor at law of the state of New York.

*Edwin T. Taliaferro and Paul Jones* for appellant.

*Tompkins McIlvaine* for respondent.

Order affirmed; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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DAVID M. H. PLACE, Respondent, *v. GEORGIANA E. KENNEDY*, Appellant, Impleaded with Others.

*Place v. Kennedy*, 89 App. Div. 167, affirmed.

(Argued April 4, 1907; decided April 23, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered

January 7, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action of partition.

*Edward L. Blackman* and *Alfred B. Cruikshank* for appellant.

*Burton C. Meighan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: **CULLEN**, Ch. J., **O'BRIEN**, **EDWARD T. BARTLETT**, **HAIGHT**, **VANN**, **HISCOCK** and **CHASE**, JJ.

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**WILLIAM STANTON**, Appellant, *v.* **INTERNATIONAL RAILWAY COMPANY**, Respondent.

*Stanton v. International Railway Co.*, 109 App. Div. 910, affirmed.  
(Argued April 4, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 21, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

*Philip A. Laing* for appellant.

*Charles B. Sears* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: **CULLEN**, Ch. J., **O'BRIEN**, **EDWARD T. BARTLETT**, **HAIGHT**, **VANN** and **CHASE**, JJ. Not sitting: **Hiscock**, J.

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**THE PEOPLE OF THE STATE OF NEW YORK**, Appellant, *v.* **CHARLES M. COLMEY**, Respondent.

*People v. Colmey*, 116 App. Div. 516, affirmed.  
(Argued April 8, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

December 28, 1906, which reversed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of attempt to commit forgery in the first degree.

*William Travers Jerome, District Attorney (E. Crosby Kindleberger of counsel), for appellant.*

*Clark L. Jordan and Charles Lex Brooke for respondent.*

Order affirmed; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**FANNIE KOPPER, Respondent, v. CITY OF YONKERS, Appellant.**

*Kopper v. City of Yonkers, 110 App. Div. 747, affirmed.*

(Argued April 8, 1907; decided April 23, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 3, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

*Francis A. Winslow and William J. Wallin for appellant.*

*Thomas F. Curran and William F. Bleakley for respondent.*

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**RICHARD A. PEABODY, Respondent, v. THE ANTHONY & SCOVILL COMPANY, Appellant.**

*Peabody v. Anthony & Scovill Co., 104 App. Div. 681, affirmed.*

(Argued April 8, 1907; decided April 23, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June

5, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to rescind an alleged sale of stock.

*Louis Marshall and Samuel H. Evins* for appellant.

*Thomas Thacher and Mark Hyman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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ELIZA POLAND, Appellant, v. UNITED TRACTION COMPANY, Respondent.

*Poland v. United Traction Co.*, 112 App. Div. 907, affirmed.

(Argued April 8, 1907; decided April 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 19, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*George B. Wellington* for appellant.

*John E. MacLean* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT and HISCOCK, JJ. Dissenting: EDWARD T. BARTLETT and VANN, JJ. Not sitting: CHASE, J.

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FRANCIS J. MARKHAM, Respondent, v. DAVID STEVENSON BREWING COMPANY, Appellant.

*Markham v. Stevenson Brewing Co.*, 111 App. Div. 178, affirmed.

(Argued April 8, 1907; decided April 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March

2, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial in an action to recover for alleged violations of covenants contained in a lease.

*Gratz Nathan* and *Thomas J. Farrell* for appellant.

*John H. Corwin* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *CULLEN*, Ch. J., *O'BRIEN*, *EDWARD T. BARTLETT*, *HAIGHT*, *VANN*, *HISCOCK* and *CHASE*, JJ.

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**MARY A. HALLORAN**, Respondent, *v. ISIDOR STRAUS et al.*,  
Appellants.

*Halloran v. Straus*, 112 App. Div. 899, affirmed.

(Argued April 9, 1907; decided April 23, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendants' negligence.

*Edmond E. Wise* for appellants.

*Albert Stickney, Jr.*, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *CULLEN*, Ch. J., *O'BRIEN*, *EDWARD T. BARTLETT*, *HAIGHT*, *VANN*, *HISCOCK* and *CHASE*, JJ.

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**SAMUEL UNTERMYER**, Appellant, *v. THE CITY OF YONKERS*, Respondent.

*Untermeyer v. City of Yonkers*, 112 App. Div. 808, reversed.

(Argued April 15, 1907; decided April 23, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered

April 27, 1906, which reversed a judgment of Special Term vacating and setting aside certain assessments against property belonging to plaintiff and granted a new trial.

*Louis Marshall and Ralph E. Prime* for appellant.

*Thomas F. Curran* for respondent.

*Per Curiam.* The condition of the record in this case leaves us no alternative but to reverse the order of the Appellate Division and to affirm the judgment entered upon the decision at Special Term. The learned trial court made certain findings of fact which, so long as they stand unreversed, must inevitably control the decision of the case if they are supported by evidence. An examination of the record discloses that these findings have the support of some evidence, and, as the order of the Appellate Division is silent as to the grounds upon which it reversed the judgment entered upon the decision of the trial court, it must be assumed to be a reversal purely upon questions of law. (Code Civ. Pro. § 1338.) Since this court is bound by the facts as thus found by the trial court and, in effect, approved by the Appellate Division, the only question open for decision by this court is whether the conclusions of law arrived at by the trial court are sustained by the findings of fact. As to that question there is no doubt whatever. The trial court's conclusions of law are the necessary corollaries of the findings of fact, and the Appellate Division should either have reversed the trial court upon the law and the facts, or have affirmed the judgment. As it did neither of these things, it follows that the order of the Appellate Division must be reversed and the judgment entered upon the decision of the trial court affirmed, with costs to the appellant in all courts.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ., concur.

Ordered accordingly.

JOHN VON DER BORN, Appellant, v. ANTON SCHULTZ,  
Respondent.

*von der Born v. Schultz*, 111 App. Div. 263, affirmed.

(Argued April 9, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 2, 1906, which reversed a judgment in favor of plaintiff entered upon a verdict and granted a new trial in an action to recover for an alleged breach of contract.

*Robert C. Beatty* for appellant.

*Brainard Tolles* and *George W. McAdam* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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AUGUSTUS K. SLOAN, Respondent, v. NATIONAL SURETY COMPANY, Appellant.

*Sloan v. National Surety Co.*, 111 App. Div. 94, affirmed.

(Argued April 10, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 9, 1906, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover upon two indemnity bonds.

*William B. Hornblower*, *Charles A. Boston* and *William J. Griffin* for appellant.

*Albert R. Huger* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, HISCOCK and CHASE, JJ. Not sitting: EDWARD T. BARTLETT, J.

**CLINTON SNOOK, Respondent, v. Ida L. FRENCH, Appellant,  
Impleaded with Others.**

*Snook v. French*, 111 App. Div. 910, affirmed.

(Submitted April 10, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 23, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage.

*Louis L. Waters* and *Clarence W. Austin* for appellant.

*George H. Sears* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**MARY RAFFERTY, Respondent, v. RICHARD K. ANDERSON,  
Appellant.**

*Rafferty v. Anderson*, 106 App. Div. 383, affirmed.

(Argued April 10, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 11, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to restrain the defendant from interfering with a certain fence erected by the plaintiff or trespassing upon the land inclosed thereby.

*Thomas O'Connor* for appellant.

*Eugene D. Flanigan* and *Benjamin W. Knowler* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN and HISCOCK, JJ. Not sitting: CHASE, J.

**CHARLES A. KEENE, Respondent, v. NEWARK WATCH CASE MATERIAL COMPANY, Appellant.**

*Keene v. Newark Watch Case Material Co.*, 112 App. Div. 7, affirmed.  
(Argued April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 31, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a guaranty bond.

*Isaac L. Miller and Benjamin F. Edsall* for appellant.

*George C. Harrison* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**EMILIE KOHM, as Administratrix of the Estate of ADOLPH KOHM, Deceased, Appellant, v. INTERBOROUGH RAPID TRANSIT COMPANY, Respondent.**

*Kohm v. Interborough Rapid Transit Co.*, 111 App. Div. 925, affirmed.  
(Argued April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 7, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*Charles Steckler and Levin L. Brown* for appellant.

*J. Osgood Nichols, Albert J. Kenyon and Charles A. Gardiner* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, HAIGHT, VANN, HISCOCK and CHASE, JJ: Dissenting: EDWARD T. BARTLETT, J.

WILLIAM BELDEN, Respondent, *v.* OLDSMOBILE COMPANY,  
Appellant.

*Belden v. Oldsmobile Co.*, 112 App. Div. 899, affirmed.  
(Submitted April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 15, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to rescind a contract of sale and to recover back the purchase price on the ground of breach of warranty.

*C. Andrade, Jr.*, for appellant.

*Lemuel E. Quigg and Charles W. Coleman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,  
HAIGHT, VANN, HISCOCK and CHASE, JJ.

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JOHN A. C. NICHOLS, Respondent, *v.* THE CITY OF NEW  
ROCHELLE, Appellant.

*Nichols v. City of New Rochelle*, 111 App. Div. 921, affirmed.  
(Argued April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 3, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Abram J. Rose, Alfred C. Petté and William D. Sawyer*  
for appellant.

*Michael J. Tierney* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,  
HAIGHT, VANN, HISCOCK and CHASE, JJ.

**JACOB KLEIN, Respondent, v. MARTIN T. GARVEY, Appellant.**

*Klein v. Garvey*, 112 App. Div. 911, affirmed.  
(Argued April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 11, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Carl Schurz Peirasch* and *Henry S. Mansfield* for appellant.

*Julius Hilbern Cohn* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *CULLEN*, Ch. J., *O'BRIEN*, *EDWARD T. BAETLETT*, *HAIGHT*, *VANN*, *HISCOCK* and *CHASE*, JJ.

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**RATJE BUNKE, Respondent, v. NEW YORK TELEPHONE COMPANY, Appellant.**

*Bunke v. New York Telephone Co.*, 110 App. Div. 241, affirmed.  
(Argued April 11, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 17, 1906, affirming a judgment of the Appellate Term which affirmed a judgment of the Municipal Court of the city of New York in favor of plaintiff entered upon a verdict in an action to recover for an alleged trespass.

*Alfred B. Cruikshank* and *John H. Cahill* for appellant.

*Thaddeus D. Kenneson* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *CULLEN*, Ch. J., *O'BRIEN*, *EDWARD T. BARTLETT*, *HAIGHT*, *VANN*, *HISCOCK* and *CHASE*, JJ.

**EPPENS, SMITH & WIEMANN COMPANY, Respondent, v. HARTFORD FIRE INSURANCE COMPANY, Appellant.**

*Eppens, Smith & Wiemann Co. v. Hartford Fire Ins. Co.*, 112 App. Div. 900, affirmed.

(Argued April 12, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 27, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover an amount alleged to be due under a policy of fire insurance.

*Raymond Rubenstein and Edgar J. Nathan* for appellant.

*Arnold L. Davis* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT  
HAIGHT, VANN, HISCOCK and CHASE, JJ.

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**ERMINIA ARCIERI, as Administratrix of the Estate of DONATO ARCIERI, Deceased, Respondent, v. THE LONG ISLAND RAILROAD COMPANY, Appellant.**

*Arcieri v. Long Island R. R. Co.*, 112 App. Div. 912, affirmed.

(Argued April 12, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 9, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence.

*William C. Beecher and Joseph F. Keany* for appellant.

*Rosario Maggio* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT,  
HAIGHT, VANN, HISCOCK and CHASE, JJ.

FRANK RUSSELL, Respondent, *v.* NATIONAL EXHIBITION COMPANY, Appellant.

*Russell v. National Exhibition Co.*, 108 App. Div. 609, affirmed.

(Argued April 15, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 13, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover an amount alleged to be due under a contract for services.

*Cornelius J. Sullivan, De Lancey Nicoll and Raymond D. Thurber* for appellant.

*John M. Ward* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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EDWARD CRAMSEY, Respondent, *v.* CHARLES A. STERLING, Appellant.

*Cramsey v. Sterling*, 111 App. Div. 568, affirmed.

(Argued April 15, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1906, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial in an action to rescind and set aside a conveyance of an interest in certain real and personal property upon the ground of false representations having induced the conveyance.

*Hubert E. Rogers* for appellant.

*Lyman E. Warren and George W. Bristol* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

CATHARINE HYNDs, Respondent, *v.* BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

*Hynds v. Brooklyn Heights R. R. Co.*, 111 App. Div. 839, affirmed.  
(Argued April 15, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 8, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

*I. R. Oeland* and *George D. Yeomans* for appellant.

*George V. Brower* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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MARCELLA M. KEEFE, Respondent, *v.* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Appellant.

*Keefe v. Liverpool & London & Globe Ins. Co.*, 111 App. Div. 907, affirmed.

(Argued April 15, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 6, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of fire insurance.

*Thomas S. Jones* for appellant.

*D. F. Searle* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ. Not sitting: HISCOCK, J.

BUFFALO CLEAN STREET COMPANY, Appellant, *v.* CITY OF BUFFALO, Respondent.

*Buffalo Clean Street Co. v. City of Buffalo*, 113 App. Div. 887, affirmed.  
(Argued April 15, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 12, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term in an action for the reformation of a contract.

*Simon Fleischmann* and *Damase J. Cadotte* for appellant.

*Samuel F. Moran* and *Louis E. Desbacker* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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JAMES E. ROCK et al., Respondents, *v.* THE ACKER PROCESS COMPANY, Appellant.

MARY CLIFFORD, Respondent, *v.* THE ACKER PROCESS COMPANY, Appellant.

ANNIE F. JOYCE et al., Respondents, *v.* THE ACKER PROCESS COMPANY, Appellant.

JOHN KOELLE, Respondent, *v.* THE ACKER PROCESS COMPANY, Appellant.

KATIE LOCHER, Respondent, *v.* THE ACKER PROCESS COMPANY, Appellant.

ANDREW WATTENGEL, Respondent, *v.* THE ACKER PROCESS COMPANY, Appellant.

*Rock v. Acker Process Co.*, 112 App. Div. 695, affirmed.  
(Argued April 16, 1907; decided April 30, 1907.)

APPEAL in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the

fourth judicial department, entered May 8, 1906, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action to restrain an alleged nuisance and to recover damages occasioned thereby.

*Mortimer Stiefel* for appellant.

*P. F. King* for respondents.

Judgments affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,  
HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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AUGUSTUS S. FITCH et al., Respondents, v. TINA B. FRASER,  
Appellant.

*Fitch v. Fraser*, 109 App. Div. 440, affirmed.

(Argued April 16, 1907; decided April 30, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 4, 1905, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to compel contribution in payment of a promissory note of which all the parties to the action were signers.

*Edwin D. Wagner* and *Robert A. Fraser* for appellant.

*Alexander Neish* for respondents.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,  
HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

CLARENCE D. BALDWIN, Appellant, *v.* JOHN J. McGRAH, Respondent, Impleaded with Another.

*Baldwin v. McGrath*, 113 App. Div. 902, affirmed.

(Argued April 16, 1907; decided April 30, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 16, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to compel specific performance of contracts for the conveyance of real property.

*Lucius H. Beers* and *Darius E. Peck* for appellant.

*Charles F. Brown*, *Charles Stewart Davison* and *Sol. A. Cohn* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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OZWELL C. PHILLIPS, Respondent, *v.* CHARLES N. LINDLEY, Appellant.

*Phillips v. Lindley*, 113 App. Div. 283, affirmed.

(Argued April 17, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 30, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover on a contract alleged to guarantee the payment of a promissory note.

*William H. Harris* for appellant.

*John Ewen* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

SAMUEL J. PEACOCK, Respondent, v. THOMAS BAILEY,  
Appellant.

*Peacock v. Bailey*, 112 App. Div. 921, affirmed.  
(Submitted April 17, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 27, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action under section 1669 of the Code of Civil Procedure to recover for an alleged forcible eviction without process.

*George E. Miner* for appellant.

*Frederick S. Lyke* and *Graham Witschief* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,  
HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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JOHN G. KOENEN et al., Respondents, v. THE CITY OF MOUNT VERNON et al., Appellants, Impleaded with Another.

*Koenen v. City of Mount Vernon*, 107 App. Div. 622, affirmed.  
(Argued April 17, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 16, 1905, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to compel the defendant city of Mount Vernon to widen Oakley avenue in said city and to restrain the other defendants from encroaching thereon.

*Milo J. White* for appellants.

*Walter S. Allerton* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT,  
HAIGHT, WERNER and HISCOCK, JJ. Not sitting: WILLARD BARTLETT, J.

JAMES TALCOTT, Appellant, *v.* THE WABASH RAILROAD COMPANY, Respondent.

*Talcott v. Wabash Railroad Co.*, 109 App. Div. 491, affirmed.  
(Argued April 17, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 16, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action under a contract of carriage to recover the value of baggage destroyed.

*Thomas H. Rothwell* for appellant.

*Adelbert Moot and Helen Z. M. Rogers* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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THOMAS FINUCAN, Appellant, *v.* THOMAS T. RAMSDEN et al., Respondents.

*Finucan v. Rameden*, 111 App. Div. 920, affirmed.  
(Argued April 17, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 31, 1906, affirming a judgment in favor of defendants entered upon a verdict and an order denying a motion for a new trial in an action to recover for the cutting down of trees alleged to have been growing on plaintiff's land.

*George Wallace* for appellant.

*James W. Treadwell and Fred Ingraham* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

**CHARLES H. BOAZ, Appellant, v. FRANK W. COOLBAUGH,  
Respondent.**

*Boaz v. Coolbaugh*, 114 App. Div. 902, affirmed.  
(Argued April 18, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 25, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to rescind a sale of stock on the ground that it was induced by fraud.

*Alexander Thain* and *Burton Thompson Beach* for appellant.

*Frank S. Gannon, Jr.*, and *Frank H. Curry* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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**ISAAC E. SMITH, Appellant, v. THE VILLAGE OF FORT PLAIN,  
Respondent.**

*Smith v. Village of Fort Plain*, 112 App. Div. 907, affirmed.  
(Argued April 18, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 21, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to restrain the diversion of the waters of a stream and for damages.

*Andrew J. Nellis* for appellant.

*Joseph L. Moore* and *H. M. Eldredge* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE ORIENTAL BANK, Respondent, *v. SAVERIO GALLO,*  
Appellant.

*Oriental Bank v. Gallo*, 112 App. Div. 380, affirmed.

(Submitted April 19, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 18, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover the amount of a certified check deposited by the defendant with the plaintiff bank upon the ground that the indorsement prior to defendant's was a forgery.

*J. Stewart Ross and Effingham L. Holywell* for appellant.

*De Witt Bailey* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J.; GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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JOSEPH W. MATHERS, Respondent, *v. INTERURBAN STREET RAILWAY COMPANY*, Appellant.

*Mathers v. Interurban Street Ry. Co.*, 112 App. Div. 397, reversed.

(Argued April 19, 1907; decided May 7, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered April 20, 1906, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Charles F. Brown, Bayard H. Ames, Anthony J. Ernest and Henry A. Robinson* for appellant.

*Thomas J. O'Neill and Frank M. Hardenbrook* for respondent.

Order of Appellate Division reversed and judgment of Trial Term affirmed, with costs in both courts, on authority of *Reed v. Metropolitan St. Ry. Co.* (180 N. Y. 315); no opinion.

Coneur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WEINER, WILLARD BARTLETT and HISCOCK, JJ.

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**HENRY McNABB et al., Respondents, v. REBECCA MERYASH et al., Appellants.**

*McNabb v. Meryash*; 118 App. Div. 903, affirmed.

(Argued April 19, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 19, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien.

*Lewis Johnston, Edward W. S. Johnston, Edward P. Orrell, Jr., and Ludwig Hobein* for appellants.

*Ferdinand E. M. Bullowa* for respondents.

Judgment affirmed, with costs; no opinion.

Coneur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WEINER, WILLARD BARTLETT and HISCOCK, JJ.

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**CHARLES H. WEIDNER, Respondent, v. GEORGE W. OLIVIT et al., Appellants.**

*Weidner v. Olivit*, 108 App. Div. 122, affirmed.

(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 11, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover an amount alleged to be due

for produce shipped to defendants, who were commission merchants, for sale.

*Judson G. Wells* for appellants.

*John J. Linson* and *Daniel B. Deyo* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ. Absent: HISCOCK, J.

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THE MERCANTILE NATIONAL BANK OF THE CITY OF NEW YORK, Respondent, *v.* HENRY B. SIRE, Appellant.

*Mercantile Nat. Bank v. Sire*, 111 App. Div. 923, affirmed.

(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 17, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on promissory notes.

*Franklin Bien* for appellant.

*Royall Victor, William V. Rowe* and *Albert S. Ridley* for respondent.

Judgment affirmed, with costs and \$1,000 damages for delay, under subdivision 5 of section 3251 of the Code of Civil Procedure; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ. Absent: HISCOCK, J.

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RASTUS S. RANSOM, as Trustee for MARY F. WELCH, Appellant, *v.* THE NASSAU TRUST COMPANY OF THE CITY OF BROOKLYN, Respondent.

*Ransom v. Nassau Trust Co.*, 107 App. Div. 624, affirmed.

(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered Sep-

tember 5, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover for an alleged conversion of trust funds.

*Raphael J. Moses* for appellant.

*W. C. Percy* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT and WERNER, JJ. Not sitting: WILLARD BARTLETT, J. Absent: HISCOCK, J.

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**FRANK LANE, Respondent, v. THE NEW YORK CENTRAL AND  
HUDSON RIVER RAILROAD COMPANY, Appellant.**

*Lane v. N. Y. C. & H. R. R. Co.*, 112 App. Div. 904, affirmed.  
(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 25, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Henry Purcell* for appellant.

*N. F. Breen* for respondent.

Judgment affirmed, with costs, on authority of *McCoy v. N. Y. C. & H. R. R. Co.* (185 N. Y. 276); no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ. Not sitting: GRAY, J. Absent: HISCOCK, J.

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**FRANCIS W. BISSELL, Respondent, v. THE SACKETT WALL  
BOARD COMPANY, Appellant.**

*Bissell v. Sackett Wall Board Co.*, 118 App. Div. 891, affirmed.  
(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

May 31, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Frank Gibbons and Harry A. Talbot* for appellant.

*James M. E. O'Grady* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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THE PEOPLE OF THE STATE of NEW YORK ex rel. FREDERIC W. SHEPARD, Respondent, v. WILLIAM B. ELLISON, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Appellant.

*People ex rel. Shepard v. Ellison*, 114 App. Div. 920, affirmed.  
(Argued April 23, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 10, 1906, upon an order which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to restore the relator to the position of clerk in the department of water supply, gas and electricity in the city of New York.

*William B. Ellison*, Corporation Counsel (*James D. Bell* of counsel), for appellant.

*Samuel H. Ordway, Conrad Saxe Keyes* and *Frederic White Shepard* for respondent.

Judgment affirmed, with costs, on opinion on the previous appeal (181 N. Y. 339).

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

THE BROOKLYN UNION ELEVATED RAILROAD COMPANY,  
Respondent, v. THE CITY OF NEW YORK, Appellant.

*Brooklyn Union Elevated R. R. Co. v. City of New York*, 112 App. Div. 928, modified.

(Argued April 23, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover compensation for the use by defendant of the plaintiff's elevated railroad structure as a support for its police and fire telegraph wires.

*William B. Ellison*, Corporation Counsel (*James D. Bell* and *James W. Covert* of counsel), for appellant.

*George W. Wingate* for respondent.

Judgment modified by deducting from recovery the interest accruing on plaintiff's claim prior to thirty days before the commencement of the action, being \$9,041.19, and as modified affirmed, without costs in this court to either party; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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J. FRANK BARR, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*Barr v. N. Y. C. & H. R. R. Co.*, 112 App. Div. 901, affirmed.  
(Argued April 22, 1907; decided May 7, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 17, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence.

*Henry Purcell* for appellant.

*Irving G. Hubbs* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., EDWARD T. BARTLETT, HAIGHT, WERNER and WILLARD BARTLETT, JJ. Not sitting: GRAY, J. Absent: Hiscock, J.

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**ALLEN B. FLANDERS**, Appellant, v. **ANNA ROSOFF et al.**, Respondents.

*Flanders v. Rosoff*, 111 App. Div. 1, affirmed.

(Argued April 24, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 29, 1906, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to compel specific performance of a contract.

*John P. Kellas* and *William S. Wade* for appellant.

*Gordon H. Main* and *Martin E. McClary* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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**ABRAHAM W. LADD**, Appellant, v. **THE TITLE GUARANTEE AND TRUST COMPANY**, Respondent.

*Ladd v. Title Guarantee & Trust Co.*, 113 App. Div. 902, affirmed.

(Argued April 24, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 17, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover on a contract of guar-

anty for a loss occasioned through defendant's alleged negligence in making a search for incumbrances on a piece of real property accepted as security for a loan.

*Frank Barker* for appellant.

*Edward E. Sprague* and *Harold Swain* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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THE FIRST NATIONAL BANK OF OSSINING, Respondent, v.  
JOHN HOAG, Appellant, Impleaded with Another.

*First Nat. Bank of Ossining v. Hoag*, 112 App. Div. 920, affirmed.  
(Submitted April 24, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 4, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover the amount of a promissory note.

*Frank L. Young* for appellant.

*Smith Lent* and *Samuel Watson* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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GEORGE V. HARTMANN et al., Respondents, v. FRANCIS J. SCHNUGG et al., Individually and as Executors of and Trustees under the Will of JOHN SCHNUGG, Deceased, et al., Appellants.

*Hartmann v. Schnugg*, 113 App. Div. 254, affirmed.  
(Argued April 24, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May

23, 1906, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action for an accounting.

*Joseph Rosenzweig* for appellants.

*Edward S. Clinch* for respondents.

Judgment affirmed, with costs.

Coneur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.  
GEORGE B. McCLELLAN, Appellant.

*People v. McClellan*, 118 App. Div. 177, affirmed.

(Argued April 24, 1907; decided May 10, 1907.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered March 8, 1907, which affirmed an order of Special Term denying a motion to set aside the summons and complaint in an action of quo warranto and the service thereof as unlawful.

The following is the question certified: "Was the determination of former Attorney-General Mayer, denying the application of William Randolph Hearst for leave to bring an action in the nature of quo warranto to try the title to the office of Mayor of the City of New York, a bar to his successor in acting under the authority vested in him by law in bringing this action?"

*Eugene Lamb Richards, Jr.*, and *G. D. B. Hasbrouck* for appellant.

*William Schuyler Jackson*, Attorney-General (*Charles A. Dolson* of counsel), for respondent.

Order affirmed, with costs, on opinion of INGRAHAM, J., below and question certified answered in the negative.

Coneur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

**HOWARD IRON WORKS, Respondent, v. BUFFALO ELEVATING COMPANY, Appellant.**

*Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, affirmed.  
(Argued April 25, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 10, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for labor performed and materials furnished.

*Tracy C. Becker, Lincoln A. Groat and Alfred L. Becker* for appellant.

*Loran L. Lewis, Jr., and William C. Carroll* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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**FRANCIS CONLON, Respondent, v. THE CITY OF NEW YORK, Appellant.**

*Conlon v. City of New York*, 113 App. Div. 912, affirmed.  
(Argued April 25, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 12, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover damages alleged to have been caused to plaintiff's property through defendant's negligence in failing to provide a proper outlet for a sewer.

*William B. Ellison, Corporation Counsel (Theodore Connolly and Royal E. T. Riggs of counsel)*, for appellant.

*Charles Maitland Beattie and Joseph P. Hennessy* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Not voting: HAIGHT, J.

**LEANER BRINK, Appellant, v. WILLIAM D. STRATTON et al., Respondents.**

*Brink v. Stratton*, 113 App. Div. 299, affirmed.  
(Argued April 25, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 8, 1906, affirming a judgment in favor of defendants entered upon a verdict and an order denying a motion for a new trial in an action to recover on a promissory note.

*John F. Bradner* for appellant.

*Abram F. Servin* and *Thomas Watts* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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**MARTHA BECKER, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.**

*Becker v. Metropolitan Life Ins. Co.*, 113 App. Div. 898, affirmed.  
(Argued April 26, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 9, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on a policy of life insurance.

*Martin T. Nachtmann* for appellant.

*Hubert C. Stratton* and *William H. Sullivan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT and HISCOCK, JJ. Absent: HAIGHT, J.

HANNAH K. GIBBONS, Appellant, v. PHILIP BEROLZHEIMER,  
Respondent.

*Gibbons v. Berolzheimer*, 108 App. Div. 609, affirmed.  
(Argued April 29, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 26, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to recover for the conversion of certain stock.

*Walter B. Raymond* and *Ralph Stout* for appellant.

*M. E. Harby* and *Sylvan Bier* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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THE CUSHMAN AND DENISON MANUFACTURING COMPANY,  
Appellant, v. CLIPPER MANUFACTURING COMPANY,  
Respondent.

*Cushman & Denison Mfg. Co. v. Clipper Mfg. Co.*, 110 App. Div. 892,  
affirmed.

(Argued April 29, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 8, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action for an injunction to restrain the alleged infringement of a trade mark.

*Charles A. Collin* for appellant.

*Oscar W. Jeffery* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

BYRON O. HUNTINGTON, Appellant, *v.* MORRIS S. HERRMAN, Respondent, Impleaded with Another.

*Huntington v. Herrman*, 111 App. Div. 875, affirmed.

(Argued April 29, 1907; decided May 10, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 27, 1906, affirming a judgment in favor of defendants entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for alleged conversion.

*Charles Goldzier* for appellant.

*Benjamin N. Cardozo* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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WINANT W. WEIR, Respondent, *v.* UNION RAILWAY COMPANY OF NEW YORK CITY, Appellant.

*Weir v. Union Railway Company*, 112 App. Div. 109, appeal dismissed.

(Argued April 30, 1907; decided May 10, 1907.)

APPEAL from a judgment, entered April 13, 1906, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and of the judgment entered upon the verdict in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Charles F. Brown, Bayard H. Ames, Anthony J. Ernest and Henry A. Robinson* for appellant.

*J. Stewart Ross* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

**ABRAHAM ELTERMAN, Appellant, v. JACOB HYMAN,  
Respondent.**

Reported below, 117 App. Div. 519.  
(Submitted May 6, 1907; decided May 10, 1907.)

**MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 8, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.**

The motion was made upon the grounds that the appeal was unauthorized, it being from an unanimous affirmation by the Appellate Division and permission to appeal not having been obtained.

*Isidor Wasservogel* for motion.

*Edward W. S. Johnston* opposed.

Motion denied, with ten dollars costs.

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**THE PEOPLE OF THE STATE OF NEW YORK ex rel. THOMAS R. McGINLEY, Appellant, v. MATTHEW J. CAHILL, as Coroner of the Borough of Richmond in the City of New York, Respondent.**

*People ex rel. McGinley v. Cahill*, 116 App. Div. 927, reversed.  
(Argued April 1, 1907; decided May 21, 1907.)

**APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered January 25, 1907, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to reinstate the relator in the position of clerk to the coroner of the borough of Richmond and dismissed the proceeding.**

*George M. Pinney, Jr., and Warren C. Van Slyke* for appellant.

*William B. Ellison, Corporation Counsel (James D. Bell of counsel),* for respondent.

Order of Appellate Division reversed and that of Special Term affirmed, with costs in both courts, on opinion in *People ex rel. Hoefle v. Cahill* (188 N. Y. 489).

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

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THE CONSOLIDATED FRUIT JAR COMPANY, Appellant, *v. Frank P. Wisner et al., as Executors of Henry C. Wisner, Deceased, Respondents.*

*Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, affirmed.  
(Argued April 26, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 10, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon the report of a referee in an action for an accounting.

*George A. Strong* for appellant.

*William A. Sutherland and Edwin A. Nash* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT and HISCOCK, JJ.

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WILLIAM KEATING, by NICHOLAS KEATING, His Guardian ad Litem, Respondent, *v. S. M. Coon, as Receiver of the Swits Conde Company*, Appellant.

*Keating v. Coon*, 115 App. Div. 920, affirmed.  
(Argued April 29, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

November 21, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been received through defendant's negligence.

*Elisha B. Powell* for appellant.

*F. T. Cahill* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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EDWARD ROWE, Respondent, *v. ISABEL H. GERRY*, Appellant,  
and THE EAST NORWALK LUMBER COMPANY et al.,  
Respondents.

*Rowe v. Gerry*, 112 App. Div. 358, affirmed.  
(Argued April 29, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 25, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose mechanics' liens.

*Henry G. K. Heath* for appellant.

*Milo J. White* for plaintiff, respondent.

*J. Mortimer Bell* for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER  
and CHASE, JJ. Not sitting: WILLARD BARTLETT, J.

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RICHARD J. ROGERS, Appellant, *v. VILLAGE OF ATTICA*,  
Respondent.

*Rogers v. Village of Attica*, 113 App. Div. 603, affirmed.  
(Argued April 29, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

May 10, 1906, affirming a judgment in favor of defendant entered upon the report of a referee in an action to restrain the defendant from changing the grade of a street.

*Russell J. Stone* for appellant.

*Elmer E. Charles* and *Willis E. Hopkins* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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In the Matter of the Accounting of JOHN C. KING, as Executor of PATRICK EAGAN, Deceased, Respondent.

SARAH EAGAN et al., Appellants.

*Matter of King*, 115 App. Div. 751, affirmed.  
(Argued April 30, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 14, 1906, which affirmed a decree of the Monroe County Surrogate's Court overruling objections to and settling the accounts of the executor of Patrick Eagan, deceased.

*Harlan W. Rippey* for appellants.

*John M. Murphy* for respondent.

Order affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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WILLIAM A. BRADY, Appellant and Respondent, v. PATRICK T. POWERS et al., Respondents and Appellants, Impleaded with Another.

*Brady v. Powers*, 112 App. Div. 845, modified.  
(Argued April 30, 1907; decided May 21, 1907.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered

April 28, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for a dissolution of a partnership and for an accounting.

*David Gerber* for plaintiff, appellant and respondent.

*James A. Allen* and *Roger Foster* for defendants, respondents and appellants.

Judgment of the Appellate Division modified so as to provide that the plaintiff, William A. Brady, recover of the defendant Patrick T. Powers the sum of \$3,798.01, with interest thereon from the 13th day of December, 1904; that the plaintiff also recover a separate and independent judgment against the defendant Kate Kennedy, as administratrix of the goods, chattels and credits of James C. Kennedy, deceased, for the like sum of \$3,798.01, with interest thereon from the 13th day of December, 1904; that the plaintiff recover of the said defendants jointly and severally the sum of \$2,452.43, being the costs and disbursements allowed by the judgment of the Special Term, with interest thereon from the 13th day of December, 1904, and that said judgment as so modified be affirmed, without costs in this court to either party. No opinion.

Concur: CULLEN, Ch. J., O'BRIEN, VANN, WERNER and WILLARD BARTLETT, JJ. For affirmance without modification: GRAY and CHASE, JJ.

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CATHARINE A. WILSON, Respondent, *v.* METROPOLITAN STREET RAILWAY COMPANY, Appellant.

*Wilson v. Metropolitan Street Ry. Co.*, 112 App. Div. 908, affirmed.  
(Argued April 30, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 9, 1906, affirming a judgment in favor of plaintiff entered

upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Charles F. Brown, Bayard H. Ames and Henry A. Robinson* for appellant.

*Abel Crook* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Not sitting: GRAY, J.

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MARY LOMAS, Respondent, v. NEW YORK CITY RAILWAY COMPANY, Appellant.

*Lomas v. New York City Ry. Co.*, 111 App. Div. 382, affirmed.

(Argued April 30, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 2, 1906, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Charles F. Brown, Bayard H. Ames, Anthony J. Ernest and James L. Quackenbush* for appellant.

*Herbert R. Limburg* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Dissenting: GRAY and O'BRIEN, JJ.

**ROCHESTER DRY GOODS COMPANY, Appellant, v. LOUISE K. FAHY, Respondent.**

*Rochester Dry Goods Co. v. Fahy*, 111 App. Div. 748, affirmed.  
(Argued May 1, 1907; decided May 21, 1907.)

APPEAL from a judgment entered March 22, 1906, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department overruling plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for defendant on a nonsuit granted at the Trial Term in an action to recover for an alleged breach of contract.

*Henry Adsit Bull* for appellant.

*George A. Carnahan* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

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**CHARLES C. CURRY, Appellant, v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Respondent.**

*Curry v. Prudential Ins. Co. of America*, 112 App. Div. 913, appeal dismissed.  
(Argued May 2, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1906, which affirmed an order of the court at a Trial Term, setting aside a verdict in favor of plaintiff which had been directed by the court and granting a motion for a new trial in an action to recover commissions alleged to have been earned by plaintiff as agent for the defendant.

*Richard T. Greene* for appellant.

*William Ogden Campbell* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER,  
WILLARD BARTLETT and CHASE, JJ.

FULLER BUGGY COMPANY, Appellant, v. ADELBERT WALDRON et al., Defendants, and CHARLES E. CUDNEY, Respondent.

*Fuller Buggy Co. v. Waldron*, 112 App. Div. 814, affirmed.  
(Argued May 2, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 22, 1906, affirming a judgment in favor of respondent herein, entered upon a verdict directed by the court in an action to recover on a promissory note.

*N. B. Spalding* for appellant.

*James A. Leary* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

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ALTER KUSHES, Appellant, v. ISIDORE GINSBERG, Respondent.

*Kushes v. Ginsberg*, 99 App. Div. 417, affirmed.  
(Argued May 3, 1907; decided May 21, 1907.)

APPEAL from a judgment entered July 13, 1905, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint in an action by a husband to recover for the loss of services of his wife through personal injuries alleged to have been occasioned by defendant's negligence.

*Benjamin Tuska* for appellant.

*Carl Schurz Petrasch* and *Henry S. Mansfield* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ.

GEORGE E. HARDING, Respondent, *v.* ROMAN CATHOLIC CHURCH OF ST. PETER, Appellant.

*Harding v. Roman Catholic Church of St. Peter*, 118 App. Div. 685, affirmed.

(Argued May 3, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 26, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for services alleged to have been rendered.

*Martin Conboy* for appellant.

*Melvin G. Palliser*, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CULLEN, Ch. J., GRAY, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Not voting: O'BRIEN, J.

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MINNIE L. DERBY, Appellant, *v.* DEGNON-MCLEAN CONTRACTING COMPANY, Respondent.

*Derby v. Degnon-McLean Contracting Co.*, 112 App. Div. 824, affirmed.  
(Argued May 6, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1906, which reversed a judgment in favor of plaintiff and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

*Melville J. France* and *L. Victor Fleckles* for appellant.

*James F. Donnelly* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.,

JANE REMSEN, Appellant, *v.* CHARLES A. WINGEERT,  
Respondent.

*Remsen v. Wingert*, 112 App. Div. 284, affirmed.

(Argued May 6, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 1, 1906, upon an order reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term, and directing judgment in favor of defendant on his counterclaim in an action to compel the specific performance of a contract for the purchase of real property.

*John Ewen and William R. Wilder* for appellant.

*Theodore T. Baylor* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.*  
WILLIAM B. WATERS et al., Respondents.

*People v. Waters*, 114 App. Div. 669, affirmed.

(Argued May 6, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 18, 1906, affirming a judgment in favor of defendants entered upon a verdict in an action to recover a penalty for a violation of section 27 of the Agricultural Law in the sale of renovated butter.

*William S. Jackson, Attorney-General (Martin F. Dillon of counsel)*, for appellant.

*Edward W. Clegg* for respondents.

Judgment affirmed, with costs, upon the ground that while an oral warning by the seller that the butter is renovated but-

ter is no excuse for a failure to comply with the statute, still, in view of the concession that the tub was marked according to the statute, the charge of the judge was wholly immaterial; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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CECELIA L. SLATER, Individually and as Executrix of JOHN SLATER, Deceased, Respondent, *v.* JOHN J. SLATER, Appellant, Impleaded with Another.

*Slater v. Slater*, 114 App. Div. 180, affirmed.  
(Argued May 7, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 29, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to cancel an agreement on the ground of alleged duress.

*John A. Garver* for appellant.

*Edward W. Hatch* and *John L. Lindsay* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent, CULLEN, Ch. J.

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CATHARINE J. BROWN, Individually and as Executrix of IRA BROWN, Deceased, Appellant, *v.* THE NEW YORK CAB COMPANY, LIMITED, Defendant, and SARA G. BRONSON et al., as Executors of FREDERIC BRONSON, Deceased, Respondents.

*Brown v. Bronson*, 114 App. Div. 911, affirmed.  
(Argued May 7, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 20, 1906, affirming a judgment in favor of defendants entered

upon a dismissal of the complaint by the court on trial at Special Term in an action to recover a certificate of stock pledged as collateral security for the payment of a promissory note.

*John A. Straley* for appellant.

*Flamen B. Candler* and *William Jay* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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CITIZENS' CENTRAL NATIONAL BANK OF NEW YORK, Appellant,  
*v. Harry L. Toplitz*, Respondent.

*Citizens' Central Nat. Bank v. Toplitz*, 113 App. Div. 73, affirmed.  
(Argued May 7, 1907; decided May 21, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 11, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover a balance alleged to be due on a promissory note.

*Charles Blandy* and *Frederick A. Card* for appellant.

*Richard L. Sweezy* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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ANNIE LYNCH, Appellant, *v. The Shanley Company*,  
Respondent.

*Lynch v. Shanley Co.*, 112 App. Div. 305, affirmed.  
(Argued May 7, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 11, 1906, which reversed a judgment in favor of plain-

tiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been caused through defendant's negligence.

*Marston Niles and Nathaniel Niles* for appellant.

*Roger B. Wood, George Gordon Battle and Frederick E. Fishel* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER and CHASE, JJ.  
Absent: CULLEN, Ch. J. Not voting: WILLARD BARTLETT, J.

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**ALBERT TOMPKINS**, Respondent, *v.* **FONDA GLOVE LINING COMPANY**, Appellant.

(Submitted April 29, 1907; decided May 21, 1907.)

Motion for re-argument denied, with ten dollars costs.  
(See 188 N. Y. 261.)

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**MARY C. BURKE**, as Executrix of **THOMAS P. BURKE**, Deceased, Respondent, *v.* **JOSEPH F. BAKER et al.**, Appellants, Impleaded with Another.

(Submitted April 29, 1907; decided May 21, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 188 N. Y. 561.)

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In the Matter of the Appraisal, under the Transfer Tax Act, of the Estate of **DAVID W. BISHOP**, Deceased.

**THE COMPTROLLER OF THE STATE OF NEW YORK**, Appellant; **FLORENCE V. C. PARSONS et al.**, as Executors, Respondents.

*Matter of Bishop*, 111 App. Div. 545, appeal dismissed.  
(Argued May 20, 1907; decided May 21, 1907.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

March 9, 1906, which affirmed an order of the New York County Surrogate's Court appointing a referee to take testimony in respect to decedent's residence and refusing to confirm the report of a transfer tax appraiser in regard thereto.

*A. Page Smith and James J. McEvilly* for appellant.

*Herbert Parsons* for respondents.

Appeal dismissed, with costs; no opinion.

Concur: CULLEN, Ch. J., O'BRIEN, EDWARD T. BAETLETT, HAIGHT, VANN, HISCOCK and CHASE, JJ.

---

JULES C. CARITEY, Appellant, *v.* FREDERICK H. EGgers et al.  
Respondents.

Reported below, 116 App. Div. 909.

(Argued May 20, 1907; decided May 21, 1907.)

MOTION to dismiss an appeal, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 14, 1906, which affirmed an order of Special Term vacating the service of the summons and complaint on one of the defendants herein.

The motion was made upon the ground that the notice of appeal and undertaking thereon were not served until after the time to appeal had expired.

*Frank H. Deal* for motion.

*Melville B. Mendell* opposed.

Motion denied, with ten dollars costs.

PATRICK J. HOGUE, Respondent, *v.* MORRIS W. SIMONSON et al.,  
Appellants.

*Hogue v. Simonson*, 114 App. Div. 906, affirmed.  
(Argued May 8, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 7, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of warranty.

*M. A. Leary* for appellants.

*Monroe Wheeler* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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HARRY P. WHITAKER, Respondent, *v.* JENNY K. STAFFORD,  
Appellant.

*Whitaker v. Stafford*, 114 App. Div. 900, affirmed.  
(Argued May 8, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action by a surviving partner to recover from the residuary legatee of his deceased partner money paid by him upon a partnership debt.

*John L. Romer* for appellant.

*Frank Brundage* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

FRANCIS B. ROBERT, Appellant, *v.* DAVID KIDANSKY, Respondent, Impleaded with Another.

*Robert v. Kidansky*, 111 App. Div. 475, affirmed.

(Argued May 8, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 17, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover the amount of a deficiency judgment entered upon a foreclosure sale, the collection of the mortgage having been guaranteed by defendant.

*Edmund L. Mooney* and *Frederick A. Card* for appellant.

*John Frankenheimer* and *Joseph C. Levi* for respondent.

Judgment affirmed, with costs, on opinion below.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

---

HORACE HOSLEY, Appellant, *v.* NIAGARA FALLS MILLING COMPANY, Respondent.

*Hosley v. Niagara Falls Milling Co.*, 107 App. Div. 620, affirmed.

(Argued May 8, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 2, 1905, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been occasioned through defendant's negligence.

*Norman D. Fish* for appellant.

*Clinton B. Gibbs* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, WERNER and CHASE, JJ. Dissenting: VANN and WILLARD BARTLETT, JJ. Absent: CULLEN, Ch. J.

SOLOMON ROSENSTEIN et al., Appellants, *v.* THE TRADERS' INSURANCE COMPANY OF CHICAGO, Respondent.

*Rosenstein v. Traders' Ins. Co. of Chicago*, 112 App. Div. 902, affirmed.  
(Argued May 9, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 21, 1907, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover on a policy of fire insurance.

*Vernon Cole* for appellants.

*Horace McGuire* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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PAULINE ROSENTHAL, Appellant, *v.* NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Respondent.

*Rosenthal v. N. Y., Susquehanna & W. R. R. Co.*, 112 App. Div. 436, affirmed.  
(Argued May 9, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 5, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been occasioned through defendant's negligence.

*T. B. Chancellor, W. M. K. Olcott and Henderson Peck* for appellant.

*Frederic B. Jennings* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

CHARLES L. ROWLAND, Appellant and Respondent, v.  
WILLIAM J. LOGAN et al., Respondents and Appellants.

*Rowland v. Logan*, 112 App. Div. 889, affirmed.  
(Argued May 9, 1907; decided May 28, 1907.)

CROSS-APPEALS from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1906, affirming a judgment of Special Term in an action for an accounting between parties to a stock transaction.

*Asa A. Spear* for plaintiff, appellant and respondent.

*Augustus Van Wyck* for William J. Logan, defendant, respondent and appellant.

*Henry De Hondt* for Sarah E. Blodget, as administratrix of Charles W. Blodget, deceased, defendant, respondent and appellant.

*Paul F. Lorzer* for Frank J. Logan, defendant, respondent and appellant.

Judgment affirmed, without costs to either party; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER and CHASE, JJ.  
Absent: CULLEN, Ch. J. Not sitting: WILLARD BARTLETT, J.

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H. ALLEN WAGENER, Respondent, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.

*Wagener v. Fidelity & Casualty Co.*, 114 App. Div. 916, affirmed.  
(Submitted May 9, 1907; decided May 28, 1907.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 18, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of accident insurance.

*John Gillette* for appellant.

*M. A. Leary* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT and CHASE, JJ. Absent: CULLEN, Ch. J.

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**ACHILLE J. OISHEI, Respondent, v. PENNSYLVANIA RAILROAD COMPANY, Appellant, Impleaded with Another.**

Reported below, 117 App. Div. 110.

(Argued May 20, 1907; decided May 28, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 19, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The motion was made upon the ground that the appeal was unauthorized as coming within the exceptions set forth in subdivision 2 of section 191 of the Code of Civil Procedure.

*Achille J. Oishei* for motion.

*Norman B. Beecher* opposed.

Motion denied, with ten dollars costs.

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**HENRY H. JACKSON et al., as Executors of and Trustees under the Will of PETER A. H. JACKSON, Appellants, v. MARY E. ROWE, Respondent.**

Reported below, 106 App. Div. 65, 614.

(Argued May 20, 1907; decided May 28, 1907.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 29, 1905, affirming a judgment in favor of defendant entered upon a decision of the court on

trial at Special Term. Also motion to dismiss an appeal from an order of said Appellate Division, entered June 29, 1905, which affirmed an order of Special Term denying a motion for a new trial.

The first motion was made upon the ground that no questions of law were raised which could be reviewed by the Court of Appeals, the exceptions being frivolous and the Appellate Division having unanimously decided that the findings of the trial court were supported by the evidence. The second on the grounds that the order sought to be reviewed was not an intermediate order and the granting or refusing thereof was discretionary.

*F. B. Woodruff* for motion.

*John L. Wells* opposed.

Motion to dismiss appeal from judgment denied, with ten dollars costs. Appeal from order dismissed and record deemed amended by striking out all papers and proceedings with reference thereto.

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In the Matter of the Accounting of ANN WILEY et al., as Executors of GEORGE WILEY, Deceased, Respondents.

ELIZA E. ROXBURY, as Administratrix of the Estate of CHARLES W. ROXBURY, Deceased, et al., Appellants; ANN WILEY et al., Respondents.

(Submitted May 21, 1907; decided May 28, 1907.)

Motion for re-argument denied, with ten dollars costs. Motion to amend remittitur denied, without costs. (See 188 N. Y. 579.)

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE R. ADAMS, Appellant, v. JACOB F. STOLL et al., as Assessors of the Town of Rosendale, Respondents.

(Submitted May 21, 1907; decided May 28, 1907.)

Motion for re-argument denied, with ten dollars costs. (See 188 N. Y. 586.)

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**WILSON R. HUNTER, Respondent, v. MUTUAL RESERVE LIFE  
INSURANCE COMPANY, Appellant.**

Reported below, 118 App. Div. 94.  
(Argued May 20, 1907; decided May 28, 1907.)

MOTION to dismiss an appeal, by permission, from a judgment entered March 13, 1907, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of the Appellate Term reversing a judgment of the City Court of New York in favor of plaintiff and dismissing the complaint and affirmed the judgment of said City Court.

The motion was made upon the ground that the questions involved have been considered by and passed upon by the Court of Appeals and by the United States Supreme Court and that the judgment herein is in harmony with such decisions.

*Albert P. Massey* for motion.

*Sewell T. Tyng* opposed.

**Motion denied, with ten dollars costs.**



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**ALIENATION.**

When gift of residuary estate in trust to pay annuity to widow for life and balance of income to children during lives of two daughters not an unlawful suspension of power of alienation.

*See TRUSTS*, 10.

**APPEAL.**

1. *Order of Appellate Division Reversing Judgment and Granting a New Trial, "The Facts Having Been Examined and No Error Found Therein" — What Questions of Law May Be Reviewed by Court of Appeals.* Where the Appellate Division, by a divided court, reverses a judgment and orders a new trial "upon questions of law only, the facts having been examined and no errors found therein," the Court of Appeals upon an appeal from the order of reversal can review the questions of law that were before the Appellate Division, since such order means that the Appellate Division did not permit the judgment to stand because it reached the conclusion that the most favorable view of the evidence, accepting it as true, fell short of supporting the judgment. *Serano v. N. Y. C. & H. R. R. Co.* 156

2. *Incidental Order in Habeas Corpus Proceedings Not Reviewable by Appellate Division.* An order in a habeas corpus proceeding which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable, under section 2058 of the Code of Civil Procedure, since it is not a final order; and an order of the Appellate Division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding and is, therefore, reviewable by the Court of Appeals. *People ex rel. Duryee v. Duryee.* 440

3. *Affirmance of Judgment Overruling Demurrer — Leave to Plead Over.* Where an order of the Appellate Division affirming an interlocutory judgment overruling a demurrer to the complaint grants leave to plead over conditionally, the affirmance of the order by the Court of Appeals carries with it an affirmance of such leave, and express permission by that court to withdraw the demurrer and interpose an answer is unnecessary. *Cassidy v. Sauer* (Mem.). 547

Written contract not found cannot be read into the findings, although stated in the pleadings and set forth in the record.

*See ATTORNEY AND CLIENT*, 1.

**APPEAL** — *Continued.*

Review of legislative apportionment by Court of Appeals.

*See CONSTITUTIONAL LAW, 2.*

Whether case is so difficult and extraordinary as to justify extra allowance a question of law reviewable by Court of Appeals.

*See COSTS, 1.*

Unreasonable delay.

*See CRIMES, 4.*

**APPELLATE DIVISION.**

Incidental order in habeas corpus proceeding not reviewable by.

*See APPEAL, 2.*

Submission of controversy to — question of fact cannot be determined.

*See JURISDICTION, 1, 2.*

**APPORTIONMENT.**

Of state by legislature — limit of legislative discretion — when apportionment invalid.

*See CONSTITUTIONAL LAW, 1-9.*

**ARREST.**

*See Herbert v. de Murias (Mem.), 586.*

**ARSON.**

*See People v. Brown (Mem.), 554.*

**ASSESSMENTS.**

*See People ex rel. Jardine v. Brush (Mem.), 544; People ex rel. Adams v. Stoll (Mem.), 586; Untermyer v. City of Yonkers (Mem.), 594.*

**ASSOCIATIONS.**

1. *Mutual Benefit Societies — When By-laws Affecting Certificates or Policies of Life Insurance Cannot Be Amended.* While a "mutual benefit fraternity," or fraternal insurance society, may so amend its by-laws as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution. (Art. 1, § 10.) *Ayers v. Order of United Workmen.* 280

2. *When By-law Restricting Business or Occupation of Insured Is Void as to Certificate Previously Issued.* Payment of a certificate of life insurance issued by a "mutual benefit fraternity," or society, upon which dues had been paid by the assured and accepted by the society to the time of his death, cannot be avoided upon the ground that the assured, at the time of his death, was, and for a few months prior thereto had been, engaged in the hotel business, in violation of a by-law adopted by the society, without notice to the assured, many years after his certificate was issued, prohibiting any certificate holder of the society from selling liquors at retail, and declaring the certificate of any one engaging in such business void for a violation thereof, where neither the certificate in question, or the application therefor, nor the by-laws under which the certificate was issued, contained any restriction as to the business in which the assured might engage. *Id.*

3. *Agreement, in Application for Certificate, to Obey All Laws and Regulations Enacted and to Be Enacted, Does Not Justify Change in By-laws Affecting Vested Rights.* The fact that in the application, upon which the certificate was issued, the assured agreed to comply with all

**ASSOCIATIONS — *Continued.***

laws, regulations and requirements of the society which were then, or might thereafter be, enacted, there being no reservation in the by-laws of the specific right to amend them so as to restrict the occupation, or business, of the assured, did not permit an amendment in that respect without the consent of the assured, and the attempt made without his consent was beyond the power of the society and absolutely void; since the effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right of which the assured could not be deprived without his consent. *Id.*

**ATTACHMENT.**

*See Arkenburgh v. Arkenburgh* (Mem.), 552; *Cullen v. Alvord* (Mem.), 574.

**ATTORNEY AND CLIENT.**

1. *Appeal — Written Contract Not Found Cannot Be Read into the Findings, Although Stated in the Pleadings and Set Forth in the Record.* Where the findings, in an action to establish the rights and lien of a firm of attorneys in and to a fund recovered in a legal proceeding, under a written agreement of retainer, do not contain the agreement *in extenso* but only the substance thereof, omitting one important clause, such clause cannot be read into the findings by reason of the fact that the entire agreement is a part of the pleadings constantly referred to in the progress of the case through the courts and is printed in full at least three times in the record. *Ransom v. Cutting.* 447

2. *When Agreement to Contest Will and Pay Disbursements for a Contingent Fee, Not Unconscionable.* The mere fact that the attorney was to receive a certain portion of the recovery, does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for was so excessive as to evince a purpose to obtain an improper or undue advantage. *Id.*

3. *When Agreement Is Not Champertous.* Where a disinherited son voluntarily and at his own instance entered into a written agreement retaining attorneys to oppose the probate of his father's will or to effect a settlement, agreeing to pay them specified percentages in either case, the mere fact that the agreement provided that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," does not render it champertous within the meaning of section 74 of the Code of Civil Procedure; the purpose of this section is to prevent an attorney from encouraging, instigating or promoting ill-feeling or strife, and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon. *Id.*

**ATTORNEYS.**

1. *Refusal to Answer Questions upon the Ground That Answers Might Incriminate, No Ground for Disbarment.* An attorney at law, when called as a witness, has the right to refrain from answering any question which might lead to the prosecution of himself for a forfeiture of his office of attorney and counselor at law; his refusal, therefore, to answer questions as to personal transactions upon the ground that his answers might tend to incriminate him, is not a sufficient cause for his disbarment. (*Code Civ. Pro. § 837.*) *Matter of Kuffenburgh.* 49

2. *Alleged Aid to Client Out on Bail, to Escape.* An attorney is not guilty of unprofessional conduct sufficient to cause his disbarment, in chartering a boat to take his client out of the state after he had been admitted to bail pending proceedings instituted for his extradition to another state, in the absence of a charge or evidence that his client intended to forfeit his bail or that he intended to reach another jurisdic-

**AUTOBOMOBILE.**

Right of action — if operator of automobile is compelled by return, or that his conduct is reckless and is serving a lawful purpose. *Id.*

Right of action — *operator of automobile* under § 146 of Disbarred Attorney. An attorney who continues to practice under the name of a firm by which he was once a member, or member of which is dead and the other disbarred, is guilty of contempt and subject to disbarment; he may be subject to the Disbarment Law in 1947 (n. 45, § 20), and by the court of appeals will be disbarred partner to continue his firm name and practice a certificate will the county clerk to the effect that he is no longer practicing under the name of the firm in compliance with the law. In the Bronx County these provisions must be read in conjunction with section 12 of the Code of Civil Procedure, and a person who attorney has not yet become liable for the costs of attorney's fees will be estopped to nullify the order of the court of appeals if it is determined that the disbarred partner is the name that which the court intended when attorney was disbarred. *Id.*

*See* *Attorney or Notary Mem.*, 20.

**AUTOBOMOBILE.**

Right of action — duty of city to keep its streets free from dangerous objects.

*See* *Municipal Corporations*, 1-4.

**BAXTER.**

For open park stock.  
*See* *Fair Deal*.

**BENEFIT ASSOCIATIONS.**

Value of lives offering certificates of life insurance cannot be unclaimed.

*See* *Associations*, 1-4.

**BILLS, NOTES AND CHECKS.**

*See* *Commercial Bank v. Curtis Mem.*, 614; *Morrisville Nat. Bank v. Sire Mem.*, 615; *First Nat. Bank v. Head Mem.*, 617; *Brink v. Morrissey Mem.*, 618; *Federated Bldggs Co. v. Waldron (Mem.)*, 630; *Citizens Central Nat. Bank v. Ingalls Mem.*, 634.

**BROKERS.**

*See* *Thompson v. Walker Mem.*, 571.

**BROOKHAVEN TOWN OF.**

Grant of land by — right of access to, includes right to construct pier beyond high-water mark w/o consent of owner of land under water.

*See* *RIGHTS RIGHTS*, 1, 2.

**BUILDING.**

Right of action by alleged negligence of several contractors.

*See* *NEGLIGENCE*, 14.

Sightboard on roof of — injuries caused by its fall.

*See* *NEGLIGENCE*, 15.

**CANCELLATION.**

Of policy of fire insurance.

*See* *INSURANCE*, 2.

**CARRIERS.**

*See* *Talbott v. Wabash R. R. Co. (Mem.)*, 608.

**CHAMPERTY.**

When agreement to contest will and pay disbursements for a contingent fee not champertous.

*See ATTORNEY AND CLIENT*, 8.

**CITIES.**

Duty of, to keep streets free from dangerous defects—use of automobiles upon city streets.

*See MUNICIPAL CORPORATIONS*, 1-4.

When destruction of building by crowd does not constitute riot.

*See MUNICIPAL CORPORATIONS*, 5.

When electrical company not entitled to build subways in streets.

*See NEW YORK (CITY OF)*, 8.

**CIVIL SERVICE.**

*See People ex rel. Lazenby v. New York City Ry. Co.* (Mem.), 588; *People ex rel. Shepard v. Ellison* (Mem.), 614; *People ex rel. McGinley v. Cahill* (Mem.), 623.

When clerk removed from position in office of coroner entitled to mandamus directing his reinstatement.

*See NEW YORK (CITY OF)*, 5-7.

**CLEMENCY,**

Appeal for, cannot be considered by Court of Appeals—application must be made to the governor.

*See CRIMES*, 2.

**CODE OF CIVIL PROCEDURE.**

1. §§ 16, 17—*Warranty Deed—Action upon Covenants Thereof to Recover Amount of Dower and Costs Paid in Action for Dower Defended by Grantee—What Grantee May Recover.* Where it was determined in an action to enforce a widow's right of dower in premises, held by a grantee under a deed containing covenants of warranty and quiet enjoyment, that the widow was entitled to dower as claimed, and that her claim cou'd not be properly satisfied by setting off to her any part of the premises, and, the widow having filed a consent to take a gross sum in lieu of dower, a judgment was entered directing a sale of the property in accordance with the statute (Code Civ. Pro. §§ 16, 17, etc.), the sale under such judgment did not operate as an absolute and total eviction of the grantee from the entire premises; it was simply a method of procedure by which there was a substitution of the proceeds of the land in the place of the land itself, actual partition thereof being impracticable, so that the proceeds could be divided between the widow and the grantee, according to their respective interests, after the value of the widow's right of dower therein had been ascertained; the grantee of such premises cannot recover, therefore, in an action brought against his grantor upon the covenants in his deed, the entire purchase price paid for the premises together with his costs and disbursements incurred in defending the action for dower. Where, however, notice was given to the grantor to defend in the dower action, and upon his failure so to do the grantee defended in good faith, the latter may recover the amount paid to the widow for her right of dower and the costs and disbursements allowed and paid to her in the action for dower, also his own costs and disbursements in defending such action and the referee's fees and expenses therein, together with interest on each item from the date of sale, except the item of his own costs and expenses, and upon that from the date of judgment in the action for dower. *Olmstead v. Rawson*. 517

2. § 72—*Disbarment—Practicing under Name of Disbarred Attorney.* An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other

**CODE OF CIVIL PROCEDURE — *Continued.***

disbarred, is guilty of unprofessional conduct justifying his disbarment; he is not protected by the Partnership Law (L. 1897, ch. 420, § 20), and by filing, under an arrangement with the disbarred partner to continue his trade name and practice, a certificate with the county clerk to the effect that he is continuing the business under the name of the firm in compliance with section 363b of the Penal Code; those provisions must be read in connection with those of section 72 of the Code of Civil Procedure, and so read, such attorney not only became liable for the penalties therein provided, but he attempted to nullify the order of the court by arranging to do for the disbarred partner in his name that which the court prohibited such partner from doing himself. *Matter of Kaffenburgh.* 49

3, § 74 — *When Agreement Is Not Champertous.* Where a disinherited son voluntarily and at his own instance entered into a written agreement retaining attorneys to oppose the probate of his father's will or to effect a settlement, agreeing to pay them specified percentages in either case, the mere fact that the agreement provided that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," does not render it champertous within the meaning of section 74 of the Code of Civil Procedure; the purpose of this section is to prevent an attorney from encouraging, instigating or promoting ill-feeling or strife, and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon. *Ransom v. Cutting.* 447

4. §§ 190, 191 — *Review by Court of Appeals.* While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191.) Upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted. *Matter of Sherrill v. O'Brien.* 185

5. § 829 — *Witnesses — When Interest of Witness in Result of Action Too Remote to Disqualify Him from Testifying as to Conversations with a Deceased Defendant.* Where an action was brought against the members of a firm to recover for goods sold and delivered to them, and one of the defendants died after the commencement of the action, and his administrators with will annexed were substituted in his place and stead, the secretary and treasurer of an insolvent corporation whose assets were sold by the sheriff several years previous is not disqualified under the statute (Code Civ. Pro. § 829) from testifying, as a witness for plaintiff, to conversations had with the deceased member of the firm relative to the sale of the goods in question, by reason of the fact that such corporation had been an agent or factor for plaintiff's assignor in such sales, and that if plaintiff failed to recover from defendants because of any mistake or fault on the part of such corporation, the mistake or fault would be chargeable to the corporation. The interest of the witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, is too remote, uncertain and doubtful to make him interested in the event within the meaning of the statute. *Talbot v. Laubheim.* 421

6. §§ 834, 836 — *Evidence — Waiver of Provisions Relating to Patient's Secrets, by Taking Physician's Deposition — When Such Act Is Equivalent to Waiver on the Trial or by Stipulation.* Section 836 of the Code of Civil

**CODE OF CIVIL PROCEDURE — *Continued.***

Procedure, relating to waivers of the provisions of section 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, should be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action, and not to interpose an obstacle to the administration of justice by the suppression of facts already made public by the patient himself in a legal proceeding. While the examination of a witness under a commission cannot be regarded for all purposes as a part of the trial, still the taking of privileged testimony to be used as evidence by either party is so much a part of it as to constitute a waiver made "on the trial;" and where interrogatories and cross-interrogatories are prepared and signed by the attorneys for the respective parties, calling for the precise information which the statute keeps secret unless waived, such acts also constitute a waiver by "stipulation of the attorneys of the respective parties;" the exclusion, therefore, as incompetent of the deposition of plaintiff's physician, offered in evidence by defendant, the plaintiff having failed to introduce it and objected to its introduction upon the ground that it divulged facts which the witness acquired in his capacity as physician, constitutes reversible error. *Clifford v. Denver & Rio Grande R. R. Co.* 340

7. § 837 — *Attorneys — Refusal to Answer Questions upon the Ground That Answers Might Incriminate, No Ground for Disbarment.* An attorney at law, when called as a witness, has the right to refrain from answering any question which might lead to the prosecution of himself for a forfeiture of his office of attorney and counselor at law; his refusal, therefore, to answer questions as to personal transactions upon the ground that his answers might tend to incriminate him, is not a sufficient cause for his disbarment. (Code Civ. Pro. § 837.) *Matter of Kaffenburgh.* 49

8. § 1279 — *Submission of a Controversy — Jurisdiction of Courts.* Where a controversy, submitted upon an agreed statement of facts under section 1279 of the Code of Civil Procedure, presents a pure question of law, the Supreme Court has power to decide it, and the Court of Appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the Supreme Court is without jurisdiction, and a judgment entered upon such a decision must be reversed and the proceeding dismissed. *Marx v. Brogan.* 481

9. § 2058 — *Appeal — Incidental Order in Habeas Corpus Proceeding Not Reviewable by Appellate Division.* An order in a habeas corpus proceeding which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable, under section 2058 of the Code of Civil Procedure, since it is not a final order; and an order of the Appellate Division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding and is, therefore, reviewable by the Court of Appeals. *People ex rel. Duryee v. Duryee.* 440

10. §§ 2254, 2256 — *Landlord and Tenant — Summary Proceedings — Dispossession for Non-payment of Taxes and Rent — Costs.* A final order in summary proceedings to dispossess a tenant for non-payment of taxes and rent, awarding delivery of the premises to the landlord "by reason of the tenant's non-payment of said rent and said taxes, together with the costs," is erroneous where it appears that the unexpired term of the tenant was more than five years and that during an adjournment of the proceed-

**CODE OF CIVIL PROCEDURE—Continued.**

ing the tenant paid and discharged the taxes. If dispossessed for non-payment of rent he might redeem by paying the rent (Code Civ. Pro. § 2258). There is no right to redeem, however, for non-payment of taxes, and having paid them, although after the commencement of the proceeding, he is entitled to a modification of the order by striking out the statement that he was dispossessed for non-payment of taxes, since assuming that separate defaults different in character and results can be united in a single proceeding, the tenant in that proceeding has the right to obtain relief from any of the defaults upon complying with the conditions specified in section 2254 of the Code of Civil Procedure in the same manner as if the proceeding had been brought upon that default alone; and to protect his rights the order should be based only upon the default from which he has not relieved himself; nor is the tenant required to pay the costs of the proceeding at the time of paying the taxes, since they would be included in the judgment dispossessing him for non-payment of rent. *Peabody v. Long Acre Square Bldg. Co.* 103

11. § 8320—*Trustees' Commissions.* Trustees are entitled to commissions for receiving and paying out all sums of principal, including the value of the securities forming a part of the *corpus*. *Robertson v. de Brulatour.* 301

**COMMISSIONS.**

*See Curry v. Prudential Ins. Co. (Mem.), 629.*

**CONSIDERATION.**

For contract by infant.

*See CONTRACT, 1.*

When mortgage void for want of.

*See MORTGAGE, 8.*

**CONSTITUTIONAL LAW.**

1. *Legislative Apportionment—Jurisdiction of Supreme Court.* The Supreme Court has express jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the Constitution, and, if such conflict is found to exist, to declare the act void. (Const. 1894, art. III, § 5.) *Matter of Sherrill v. O'Brien.* 185

2. *Review by Court of Appeals.* While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191.) Upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted. *Id.*

3. *Powers and Limitations of the Legislature.* Although an act of the legislature is the voice of the people speaking through their representatives, the authority of the representatives in relation to an apportionment is a delegated authority wholly derived from and dependent upon the Constitution; no general power is vested in the legislature to change or modify the number of its members or the districts from which they are to be elected; the provisions of the Constitution constitute the full authority of the legislature; an examination of the Constitutions of the State from the first, adopted in 1777, to the last, adopted in 1894, together with

**CONSTITUTIONAL LAW—Continued.**

the proceedings of the constitutional convention of 1894, shows an intentional and gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon its power in the matter of apportionment, so that only the minimum of discretion, necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the Constitution, is left to the legislature. *Id.*

**4. Limit of Legislative Discretion.** The limit of legislative discretion in the division of the state into senatorial districts is to make as close an approximation to equality in the number of inhabitants as is reasonably possible. (Const. art. III, § 4.) *Id.*

**5. Apportionment of Second Senatorial District Invalid.** The formation of the second senatorial district by the joinder of Richmond and Queens counties violates the Constitution. Although by the uniform and consistent action of the various constitutional conventions Richmond county is an exception to the constitutional provision that senatorial districts must be formed from contiguous territory, the joinder of said county to the county of Queens to constitute the second senatorial district violates the Constitution because the population of Queens county under the census of 1905 being far in excess of the ratio for apportioning senators requires that Queens county should constitute a separate senatorial district. *Id.*

**6. Apportionment of Thirteenth Senatorial District Invalid.** The thirteenth senatorial district laid out in the borough of Manhattan in the city of New York violates the constitutional provision that senatorial districts shall be as compact in form as practicable. *Id.*

**7. Apportionment Act Wholly Invalid.** The violation of the constitutional provisions in the formation of the second and thirteenth senatorial districts so affects the entire Apportionment Act (L. 1906, ch. 431) as to render it wholly unconstitutional and void. *Id.*

**8. Validity of Acts of Legislature, Elected under Apportionment Act.** Notwithstanding the invalidity of the Apportionment Act the legislature elected by the people at the last general election is a *de facto* body and its acts are in all respects valid. As a *de facto* body each house has, under the Constitution, not only the exclusive power but the exclusive right to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat, becomes thereby a *de jure* member of that house; so that each member thereof, so long as the particular house to which he has been elected does not oust him, is not only a *de facto* but a *de jure* officer, entitled to all the privileges and emoluments of his office, and his title thereto cannot be challenged before any tribunal except the house itself. *Id.*

**9. Next Election Must Be Held under New Act or under Constitutional Apportionment of 1894.** While the courts cannot pass on the title of any present member of the legislature, they can control the action of administrative officers in the conduct of the next election that takes place. If the present legislature should pass a new apportionment act in compliance with the Constitution, the next general election at which members of either house are elected will be held under the new statute. If the legislature fails to discharge this duty then the election must be held in accordance with the apportionment of the Constitution of 1894. *Id.*

**CONTRACT.**

**1. Infant—Consideration—Ratification.** The facts examined in an action upon an alleged contract executed by a decedent while she was an infant, to pay an annuity to a friend, and *held* that it was a mere voluntary provision for the plaintiff based on gratitude and affection and, therefore, without such valuable consideration as would have supported an action had decedent been of age when she entered into it; and that certain payments made by decedent after attaining her majority and relied upon as

**CONTRACT — Continued.**

constituting a ratification of such contract were insufficient for that purpose. *Parsons v. Teller.* 318

**2. Judgment Creditor's Suit — Conveyance of Lands by Father to Children in Consideration That Latter Pay Income of Property to Him for Life — When Decree in Judgment Creditor's Suit against Father and Children Directing Payment of Part of Income to Creditor Does Not Relieve Children from Contract.** A father conveyed certain parcels of land to his daughters, who, in consideration thereof, agreed to apply the net income of said land, after deducting therefrom the interest on a mortgage of \$2,000, covering one of said parcels, to the support of their father during his life, and, in case the premises last described in the agreement should be sold, the proceeds thereof should be applied to the payment of said mortgage, or be invested and the interest thereon used and expended for the support of the father; two years later the daughters sold said "last described premises" for \$1,900, with which sum, and with \$100 of their own money, they paid the mortgage; subsequently a judgment creditor of the father brought an action to set aside the conveyance as fraudulent and void against the judgment; in such action the validity of the transfer was upheld, but it was decreed that the father was, as to the judgment creditor, the owner of a life estate in the lands conveyed to his daughters, subject to a lien of \$2,000, formerly represented by the mortgage, paid by the daughters; a receiver of the father's life estate was appointed and directed to pay, out of the income of the land in question, the interest on \$2,000 to the daughters, and apply the remainder on the judgment creditor's claim; after such judgment the daughters retained the whole of the interest paid to them by the receiver and failed to pay it over to, or apply it to the use of, the father; thereafter the father brought an action against his daughters to recover from them the interest on the \$1,900 of the mortgage, so retained by them; the Special Term awarded judgment in favor of the father, but the Appellate Division, by a divided court, has reversed it. *Held*, that the decree in the judgment creditor's suit did not relieve the daughters from their obligations to their father; while they were all parties to that suit no issue was raised between them and no claim for relief was made by either against the other, so that the decree therein could in no way adjudicate their respective rights under the agreement; the father is entitled, therefore, to the relief demanded and the order of the Appellate Division should be reversed and the judgment of the Special Term affirmed. *Ellis v. Cole.* 395

**3. Conditional upon Action by the Legislature — Specific Performance.** A contract for the purchase of real estate executed by the city of Syracuse in conformity with a resolution adopted by the common council, providing for the payment of a portion of the purchase price on a date specified, "the balance to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1, 1900," cannot be specifically enforced and the city compelled to accept the deed where no payment was ever made upon the contract, and no act authorizing the payment by the city of the purchase price or any part thereof has been passed by the legislature, since the provision for payment is not absolute, but conditional, depending upon future action by the legislature, and such action must be regarded as a condition precedent to any obligation on the part of the city. *Lighton v. City of Syracuse.* 499

*See Blanck v. Preston* (Mem.), 560; *Kendall v. Carnrick* (Mem.), 563; *Haydel v. Gould* (Mem.), 570; *Neidlinger v. Onward Construction Co.* (Mem.) 572; *L'Hommedieu v. Wintrop* (Mem.), 575; *Gleich v. Cobb* (Mem.), 575; *von der Born v. Schulte* (Mem.), 596; *Russell v. Nat. Exhibition Co.* (Mem.), 602; *Buffalo O. S. Co. v. City of Buffalo* (Mem.), 604; *Baldwin v. McGrath* (Mem.), 606; *Weidner v. Olivit* (Mem.), 611; *Flanders v. Rosoff* (Mem.), 616; *Howard Iron Works v. Buffalo Elevating Co.* (Mem.), 619; *Rochester Dry Goods Co. v. Fahy* (Mem.), 629; *Remsen v. Winger* (Mem.), 632.

**CONTRACT** — *Continued.*

Of retainer — when not unconscionable nor champertous.

*See ATTORNEY AND CLIENT*, 2, 3.

When evidence insufficient to establish oral contract of decedent to give all of her property to certain person.

*See DECEASED'S ESTATE*, 1.

Building and loan contract — action to recover final payment.

*See EVIDENCE*, 5.

Of accident insurance — untrue statements in application — materiality of no consequence.

*See INSURANCE*, 8, 4.

Oral contract of conditional sale.

*See VENDOR AND VENDEE*, 1-3.

**CONTRIBUTION.**

*See Fitch v. Fraser* (Mem.), 605.

**CONVERSION.**

*See Thomas v. Electric Vehicle Co.* (Mem.), 553; *Ransom v. Nassau Trust Co.* (Mem.), 612; *Gibbons v. Berolzheimer* (Mem.), 621; *Huntington v. Herrman* (Mem.), 622.

Of real property into personality by partnership agreement — when not in conflict with Real Property Law.

*See PARTNERSHIP*, 1-3.

When failure to demand property is fatal to action of conversion against purchasers of property sold by vendees in possession under conditional sale.

*See VENDOR AND VENDEE*, 3.

Of real property into personality.

*See WILL*, 2.

**CORPORATIONS.**

1. *Sale of Franchise by Receiver to an Individual.* The sale of the franchise of an insolvent electric company to an individual, made at public auction by the receiver, vests in the purchaser all the rights conferred by the original franchise. *Matter of Long Acre Hl. L. & P. Co.* 361

2. *Voluntary Assignment of Franchise by Corporation to an Individual — New York Electrical Subway Company.* The validity of a voluntary assignment by an electrical company of its franchise to an individual acting as a conduit to transmit the title to another corporation about to be formed and to which he thereafter assigned it, cannot be successfully questioned by the New York Electrical Subway Company upon an application for space in the subway by the holder of the franchise. *Id.*

3. *Mandamus to Compel Granting of Space in Subway — Consent of Commissioner of Electricity Need Not Precede Application for Space.* The applicant may mandamus the Subway Company upon its refusal to assign space and it is not necessary that the consent of the commissioner of water, gas and electricity to place its conductors in the subway should precede the application to the company. *Id.*

**COSTS.**

1. *Appeal — Extra Allowance.* Where there is no dispute about the facts, the question whether a case is so difficult and extraordinary as to justify an extra allowance is a question of law reviewable by the Court of Appeals upon an appeal from the judgment. *Campbell v. Emelie.* 509

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tion where he could not be re-arrested or compelled to return, or that his attorney was assisting him in carrying out an unlawful purpose. *Id.*

8. *Disbarment — Practicing under Name of Disbarred Attorney.* An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other disbarred, is guilty of unprofessional conduct justifying his disbarment; he is not protected by the Partnership Law (L. 1897, ch. 420, § 20), and by filing, under an arrangement with the disbarred partner to continue his trade name and practice, a certificate with the county clerk to the effect that he is continuing the business under the name of the firm in compliance with section 368b of the Penal Code; those provisions must be read in connection with those of section 72 of the Code of Civil Procedure, and so read, such attorney not only became liable for the penalties therein provided, but he attempted to nullify the order of the court by arranging to do for the disbarred partner in his name that which the court prohibited such partner from doing himself. *Id.*

*See Matter of Nekardus (Mem.), 590.*

**AUTOMOBILES.**

Use of, on city streets — duty of city to keep its streets free from dangerous defects.

*See MUNICIPAL CORPORATIONS, 1-4.*

**BANKS.**

Tax upon bank stock.

*See TAX, 1-8.*

**BENEFIT ASSOCIATIONS.**

When by-laws affecting certificates of life insurance cannot be amended.

*See ASSOCIATIONS, 1-3.*

**BILLS, NOTES AND CHECKS.**

*See Oriental Bank v. Gallo (Mem.), 610; Mercantile Nat. Bank v. Sire (Mem.), 612; First Nat. Bank v. Hoag (Mem.), 617; Brink v. Stratton (Mem.), 620; Fuller Buggy Co. v. Waldron (Mem.), 630; Citizens' Central Nat. Bank v. Toplitz (Mem.), 634.*

**BROKERS.**

*See Shaughnessy v. Weekes (Mem.), 571.*

**BROOKHAVEN (TOWN OF).**

Great South lay — right of access to, includes right to construct pier beyond high-water mark without consent of owner of land under water.

*See RIPARIAN RIGHTS, 1, 2.*

**BUILDING.**

Fall of, caused by alleged negligence of several contractors.

*See NEGLIGENCE, 14.*

Signboard on roof of — injuries caused by its fall.

*See NEGLIGENCE, 15.*

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Of policy of fire insurance.

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**CARRIERS.**

*See Talcott v. Wabash R. R. Co. (Mem.), 608.*

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When agreement to contest will and pay disbursements for a contingent fee not champertous.

*See ATTORNEY AND CLIENT*, 8.

**CITIES.**

Duty of, to keep streets free from dangerous defects—use of automobiles upon city streets.

*See MUNICIPAL CORPORATIONS*, 1-4.

When destruction of building by crowd does not constitute riot.

*See MUNICIPAL CORPORATIONS*, 5.

When electrical company not entitled to build subways in streets.

*See NEW YORK (CITY OF)*, 8.

**CIVIL SERVICE.**

*See People ex rel. Lazenby v. New York City Ry. Co.* (Mem.), 588; *People ex rel. Shepard v. Ellison* (Mem.), 614; *People ex rel. McGinley v. Cahill* (Mem.), 628.

When clerk removed from position in office of coroner entitled to mandamus directing his reinstatement.

*See NEW YORK (CITY OF)*, 5-7.

**CLEMENCY,**

Appeal for, cannot be considered by Court of Appeals—application must be made to the governor.

*See CRIMES*, 2.

**CODE OF CIVIL PROCEDURE.**

1. §§ 16, 17—*Warranty Deed—Action upon Covenants Thereof to Recover Amount of Dower and Costs Paid in Action for Dower Defended by Grantee—What Grantee May Recover.* Where it was determined in an action to enforce a widow's right of dower in premises, held by a grantee under a deed containing covenants of warranty and quiet enjoyment, that the widow was entitled to dower as claimed, and that her claim cou'd not be properly satisfied by setting off to her any part of the premises, and, the widow having filed a consent to take a gross sum in lieu of dower, a judgment was entered directing a sale of the property in accordance with the statute (Code Civ. Pro. §§ 16, 17, etc.), the sale under such judgment did not operate as an absolute and total eviction of the grantee from the entire premises; it was simply a method of procedure by which there ws a substitution of the proceeds of the land in the place of the land itself, actual partition thereof being impracticable, so that the proceeds could be divided between the widow and the grantee, according to their respective interests, after the value of the widow's right of dower therein had been ascertained; the grantee of such premises cannot recover, therefore, in an action brought against his grantor upon the covenants in his deed, the entire purchase price paid for the premises together with his costs and disbursements incurred in defending the action for dower. Where, however, notice was given to the grantor to defend in the dower action, and upon his failure so to do the grantee defended in good faith, the latter may recover the amount paid to the widow for her right of dower and the costs and disbursements allowed and paid to her in the action for dower, also his own costs and disbursements in defending such action and the referee's fees and expenses therein, together with interest on each item from the date of sale, except the item of his own costs and expenses, and upon that from the date of judgment in the action for dower. *Olmstead v. Rawson*. 517

2. § 72—*Disbarment—Practicing under Name of Disbarred Attorney.* An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other

**CODE OF CIVIL PROCEDURE — *Continued.***

disbarred, is guilty of unprofessional conduct justifying his disbarment; he is not protected by the Partnership Law (L. 1897, ch. 420, § 20), and by filing, under an arrangement with the disbarred partner to continue his trade name and practice, a certificate with the county clerk to the effect that he is continuing the business under the name of the firm in compliance with section 368b of the Penal Code; those provisions must be read in connection with those of section 72 of the Code of Civil Procedure, and so read, such attorney not only became liable for the penalties therein provided, but he attempted to nullify the order of the court by arranging to do for the disbarred partner in his name that which the court prohibited such partner from doing himself. *Matter of Kaffenburgh.* 49

**3. § 74 — When Agreement Is Not Champertous.** Where a disinherited son voluntarily and at his own instance entered into a written agreement retaining attorneys to oppose the probate of his father's will or to effect a settlement, agreeing to pay them specified percentages in either case, the mere fact that the agreement provided that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings," does not render it champertous within the meaning of section 74 of the Code of Civil Procedure; the purpose of this section is to prevent an attorney from encouraging, instigating or promoting ill-feeling or strife, and thereby securing the ownership or control of a demand of any kind for the purpose of bringing an action thereon. *Ransom v. Cutting.* 447

**4. §§ 190, 191 — Review by Court of Appeals.** While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191.) Upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted. *Matter of Sherrill v. O'Brien.* 185

**5. § 829 — Witnesses — When Interest of Witness in Result of Action Too Remote to Disqualify Him from Testifying as to Conversations with a Deceased Defendant.** Where an action was brought against the members of a firm to recover for goods sold and delivered to them, and one of the defendants died after the commencement of the action, and his administrators with will annexed were substituted in his place and stead, the secretary and treasurer of an insolvent corporation whose assets were sold by the sheriff several years previous is not disqualified under the statute (Code Civ. Pro. § 829) from testifying, as a witness for plaintiff, to conversations had with the deceased member of the firm relative to the sale of the goods in question, by reason of the fact that such corporation had been an agent or factor for plaintiff's assignor in such sales, and that if plaintiff failed to recover from defendants because of any mistake or fault on the part of such corporation, the mistake or fault would be chargeable to the corporation. The interest of the witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, is too remote, uncertain and doubtful to make him interested in the event within the meaning of the statute. *Talbot v. Laubheim.* 421

**6. §§ 834, 836 — Evidence — Waiver of Provisions Relating to Patient's Secrets, by Taking Physician's Deposition — When Such Act Is Equivalent to Waiver on the Trial or by Stipulation.** Section 836 of the Code of Civil

**CODE OF CIVIL PROCEDURE — *Continued.***

Procedure, relating to waivers of the provisions of section 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, should be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action, and not to interpose an obstacle to the administration of justice by the suppression of facts already made public by the patient himself in a legal proceeding. While the examination of a witness under a commission cannot be regarded for all purposes as a part of the trial, still the taking of privileged testimony to be used as evidence by either party is so much a part of it as to constitute a waiver made "on the trial;" and where interrogatories and cross-interrogatories are prepared and signed by the attorneys for the respective parties, calling for the precise information which the statute keeps secret unless waived, such acts also constitute a waiver by "stipulation of the attorneys of the respective parties;" the exclusion, therefore, as incompetent of the deposition of plaintiff's physician, offered in evidence by defendant, the plaintiff having failed to introduce it and objected to its introduction upon the ground that it divulged facts which the witness acquired in his capacity as physician, constitutes reversible error. *Clifford v. Denver & Rio Grande R. R. Co.*

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7. § 837 — *Attorneys — Refusal to Answer Questions upon the Ground That Answers Might Incriminate, No Ground for Disbarment.* An attorney at law, when called as a witness, has the right to refrain from answering any question which might lead to the prosecution of himself for a forfeiture of his office of attorney and counselor at law; his refusal, therefore, to answer questions as to personal transactions upon the ground that his answers might tend to incriminate him, is not a sufficient cause for his disbarment. (Code Civ. Pro. § 837.) *Matter of Kaffenburgh.* 49

8. § 1279 — *Submission of a Controversy — Jurisdiction of Courts.* Where a controversy, submitted upon an agreed statement of facts under section 1279 of the Code of Civil Procedure, presents a pure question of law, the Supreme Court has power to decide it, and the Court of Appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the Supreme Court is without jurisdiction, and a judgment entered upon such a decision must be reversed and the proceeding dismissed. *Marx v. Brogan.* 431

9. § 2058 — *Appeal — Incidental Order in Habeas Corpus Proceeding Not Reviewable by Appellate Division.* An order in a habeas corpus proceeding which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable, under section 2058 of the Code of Civil Procedure, since it is not a final order; and an order of the Appellate Division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding and is, therefore, reviewable by the Court of Appeals. *People ex rel. Duryee v. Duryee.* 440

10. §§ 2254, 2256 — *Landlord and Tenant — Summary Proceedings — Dispossession for Non-payment of Taxes and Rent — Costs.* A final order in summary proceedings to dispossess a tenant for non-payment of taxes and rent, awarding delivery of the premises to the landlord "by reason of the tenant's non-payment of said rent and said taxes, together with the costs," is erroneous where it appears that the unexpired term of the tenant was more than five years and that during an adjournment of the proceed-

**CODE OF CIVIL PROCEDURE—Continued.**

ing the tenant paid and discharged the taxes. If dispossessed for non-payment of rent he might redeem by paying the rent (Code Civ. Pro. § 2256). There is no right to redeem, however, for non-payment of taxes, and having paid them, although after the commencement of the proceeding, he is entitled to a modification of the order by striking out the statement that he was dispossessed for non-payment of taxes, since assuming that separate defaults different in character and results can be united in a single proceeding, the tenant in that proceeding has the right to obtain relief from any of the defaults upon complying with the conditions specified in section 2254 of the Code of Civil Procedure in the same manner as if the proceeding had been brought upon that default alone; and to protect his rights the order should be based only upon the default from which he has not relieved himself; nor is the tenant required to pay the costs of the proceeding at the time of paying the taxes, since they would be included in the judgment dispossessing him for non-payment of rent. *Peabody v. Long Acre Square Bldg. Co.* 103

11. § 3320—*Trustees' Commissions.* Trustees are entitled to commissions for receiving and paying out all sums of principal, including the value of the securities forming a part of the *corpus*. *Robertson v. de Brulatour.* 301

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*See CONTRACT, 1.*

When mortgage void for want of.

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**CONSTITUTIONAL LAW.**

1. *Legislative Apportionment—Jurisdiction of Supreme Court.* The Supreme Court has express jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the Constitution, and, if such conflict is found to exist, to declare the act void. (Const. 1894, art. III, § 5.) *Matter of Sherrill v. O'Brien.* 185

2. *Review by Court of Appeals.* While the Constitution does not expressly confer jurisdiction upon the Court of Appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the Appellate Division. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191.) Upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted. *Id.*

3. *Powers and Limitations of the Legislature.* Although an act of the legislature is the voice of the people speaking through their representatives, the authority of the representatives in relation to an apportionment is a delegated authority wholly derived from and dependent upon the Constitution; no general power is vested in the legislature to change or modify the number of its members or the districts from which they are to be elected; the provisions of the Constitution constitute the full authority of the legislature; an examination of the Constitutions of the State from the first, adopted in 1777, to the last, adopted in 1894, together with

**CONSTITUTIONAL LAW—Continued.**

the proceedings of the constitutional convention of 1894, shows an intentional and gradual withdrawal from the legislature of discretionary power and a continued adding of limitations upon its power in the matter of apportionment, so that only the minimum of discretion, necessary to preserve county and other lines and to give reasonable consideration to the other provisions of the Constitution, is left to the legislature. *Id.*

4. *Limit of Legislative Discretion.* The limit of legislative discretion in the division of the state into senatorial districts is to make as close an approximation to equality in the number of inhabitants as is reasonably possible. (Const. art. III, § 4.) *Id.*

5. *Apportionment of Second Senatorial District Invalid.* The formation of the second senatorial district by the joinder of Richmond and Queens counties violates the Constitution. Although by the uniform and consistent action of the various constitutional conventions Richmond county is an exception to the constitutional provision that senatorial districts must be formed from contiguous territory, the joinder of said county to the county of Queens to constitute the second senatorial district violates the Constitution because the population of Queens county under the census of 1905 being far in excess of the ratio for apportioning senators requires that Queens county should constitute a separate senatorial district. *Id.*

6. *Apportionment of Thirteenth Senatorial District Invalid.* The thirteenth senatorial district laid out in the borough of Manhattan in the city of New York violates the constitutional provision that senatorial districts shall be as compact in form as practicable. *Id.*

7. *Apportionment Act Wholly Invalid.* The violation of the constitutional provisions in the formation of the second and thirteenth senatorial districts so affects the entire Apportionment Act (L. 1906, ch. 481) as to render it wholly unconstitutional and void. *Id.*

8. *Validity of Acts of Legislature, Elected under Apportionment Act.* Notwithstanding the invalidity of the Apportionment Act the legislature elected by the people at the last general election is a *de facto* body and its acts are in all respects valid. As a *de facto* body each house has, under the Constitution, not only the exclusive power but the exclusive right to judge of the title of any of its members to a seat therein. Whoever either house receives as its legally elected member and entitled to a seat, becomes thereby a *de jure* member of that house; so that each member thereof, so long as the particular house to which he has been elected does not oust him, is not only a *de facto* but a *de jure* officer, entitled to all the privileges and emoluments of his office, and his title thereto cannot be challenged before any tribunal except the house itself. *Id.*

9. *Next Election Must Be Held under New Act or under Constitutional Apportionment of 1894.* While the courts cannot pass on the title of any present member of the legislature, they can control the action of administrative officers in the conduct of the next election that takes place. If the present legislature should pass a new apportionment act in compliance with the Constitution, the next general election at which members of either house are elected will be held under the new statute. If the legislature fails to discharge this duty then the election must be held in accordance with the apportionment of the Constitution of 1894. *Id.*

**CONTRACT.**

1. *Infant—Consideration—Ratification.* The facts examined in an action upon an alleged contract executed by a decedent while she was an infant, to pay an annuity to a friend, and held that it was a mere voluntary provision for the plaintiff based on gratitude and affection and, therefore, without such a valuable consideration as would have supported an action had decedent been of age when she entered into it; and that certain payments made by decedent after attaining her majority and relied upon as

**CONTRACT** — *Continued.*

constituting a ratification of such contract were insufficient for that purpose. *Parsons v. Teller.* 818

**2. Judgment Creditor's Suit — Conveyance of Lands by Father to Children in Consideration That Latter Pay Income of Property to Him for Life — When Decree in Judgment Creditor's Suit against Father and Children Directing Payment of Part of Income to Creditor Does Not Relieve Children from Contract.** A father conveyed certain parcels of land to his daughters, who, in consideration thereof, agreed to apply the net income of said land, after deducting therefrom the interest on a mortgage of \$2,000, covering one of said parcels, to the support of their father during his life, and, in case the premises last described in the agreement should be sold, the proceeds thereof should be applied to the payment of said mortgage, or be invested and the interest thereon used and expended for the support of the father; two years later the daughters sold said "last described premises" for \$1,900, with which sum, and with \$100 of their own money, they paid the mortgage; subsequently a judgment creditor of the father brought an action to set aside the conveyance as fraudulent and void against the judgment; in such action the validity of the transfer was upheld, but it was decreed that the father was, as to the judgment creditor, the owner of a life estate in the lands conveyed to his daughters, subject to a lien of \$2,000, formerly represented by the mortgage, paid by the daughters; a receiver of the father's life estate was appointed and directed to pay, out of the income of the land in question, the interest on \$2,000 to the daughters, and apply the remainder on the judgment creditor's claim; after such judgment the daughters retained the whole of the interest paid to them by the receiver and failed to pay it over to, or apply it to the use of, the father; thereafter the father brought an action against his daughters to recover from them the interest on the \$1,900 of the mortgage, so retained by them; the Special Term awarded judgment in favor of the father, but the Appellate Division, by a divided court, has reversed it. *Held*, that the decree in the judgment creditor's suit did not relieve the daughters from their obligations to their father; while they were all parties to that suit no issue was raised between them and no claim for relief was made by either against the other, so that the decree therein could in no way adjudicate their respective rights under the agreement; the father is entitled, therefore, to the relief demanded and the order of the Appellate Division should be reversed and the judgment of the Special Term affirmed. *Ellis v. Cole.* 395

**3. Conditional upon Action by the Legislature — Specific Performance.** A contract for the purchase of real estate executed by the city of Syracuse in conformity with a resolution adopted by the common council, providing for the payment of a portion of the purchase price on a date specified, "the balance to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1, 1900," cannot be specifically enforced and the city compelled to accept the deed where no payment was ever made upon the contract, and no act authorizing the payment by the city of the purchase price or any part thereof has been passed by the legislature, since the provision for payment is not absolute, but conditional, depending upon future action by the legislature, and such action must be regarded as a condition precedent to any obligation on the part of the city. *Lighton v. City of Syracuse.* 499

*See Blanck v. Preston* (Mem.), 580; *Kendall v. Carnrick* (Mem.), 563; *Haydel v. Gould* (Mem.), 570; *Neidlinger v. Onward Construction Co.* (Mem.) 572; *L'Hommedieu v. Wintrop* (Mem.), 575; *Gleick v. Cobb* (Mem.), 575; *von der Born v. Schults* (Mem.), 596; *Russell v. Nat. Exhibition Co.* (Mem.), 602; *Buffalo O. S. Co. v. City of Buffalo* (Mem.), 604; *Baldwin v. McGrath* (Mem.), 606; *Weidner v. Olivit* (Mem.), 611; *Flanders v. Rosoff* (Mem.), 616; *Howard Iron Works v. Buffalo Elevating Co.* (Mem.), 619; *Rochester Dry Goods Co. v. Fahy* (Mem.), 629; *Remsen v. Wingert* (Mem.), 633.

**CONTRACT** — *Continued.*

Of retainer — when not unconscionable nor champertous.

*See ATTORNEY AND CLIENT*, 2, 3.

When evidence insufficient to establish oral contract of decedent to give all of her property to certain person.

*See DECEASED'S ESTATE*, 1.

Building and loan contract — action to recover final payment.

*See EVIDENCE*, 5.

Of accident insurance — untrue statements in application — materiality of no consequence.

*See INSURANCE*, 8, 4.

Oral contract of conditional sale.

*See VENDOR AND VENDEE*, 1-3.

**CONTRIBUTION.**

*See Fitch v. Fraser* (Mem.), 605.

**CONVERSION.**

*See Thomas v. Electric Vehicle Co.* (Mem.), 553; *Ransom v. Nassau*

*Trust Co.* (Mem.), 612; *Gibbons v. Berolzheimer* (Mem.), 621;

*Huntington v. Herrman* (Mem.), 622.

Of real property into personalty by partnership agreement — when not in conflict with Real Property Law.

*See PARTNERSHIP*, 1-3.

When failure to demand property is fatal to action of conversion against purchasers of property sold by vendees in possession under conditional sale.

*See VENDOR AND VENDEE*, 3.

Of real property into personalty.

*See WILL*, 2.

**CORPORATIONS.**

1. *Sale of Franchise by Receiver to an Individual.* The sale of the franchise of an insolvent electric company to an individual, made at public auction by the receiver, vests in the purchaser all the rights conferred by the original franchise. *Matter of Long Acre El. L. & P. Co.* 361

2. *Voluntary Assignment of Franchise by Corporation to an Individual — New York Electrical Subway Company.* The validity of a voluntary assignment by an electrical company of its franchise to an individual acting as a conduit to transmit the title to another corporation about to be formed and to which he thereafter assigned it, cannot be successfully questioned by the New York Electrical Subway Company upon an application for space in the subway by the holder of the franchise. *Id.*

3. *Mandamus to Compel Granting of Space in Subway — Consent of Commissioner of Electricity Need Not Precede Application for Space.* The applicant may mandamus the Subway Company upon its refusal to assign space and it is not necessary that the consent of the commissioner of water, gas and electricity to place its conductors in the subway should precede the application to the company. *Id.*

**COSTS.**

1. *Appeal — Extra Allowance.* Where there is no dispute about the facts, the question whether a case is so difficult and extraordinary as to justify an extra allowance is a question of law reviewable by the Court of Appeals upon an appeal from the judgment. *Campbell v. Emelie.* 509

**COSTS** — *Continued.*

2. *Sime.* An extra allowance is improperly granted in an action upon contract for the recovery of money only, to which a counterclaim was interposed, where the case was disposed of by stipulation in a manner favorable to both parties, by reason of a former judgment rendered in another state upon the same cause of action between the same parties, and they, therefore, in effect, settled the controversy without trial. *Id.*

In summary proceedings.

*See LANDLORD AND TENANT.*

**COUNTERCLAIM.**

When admissions in, are admissible in evidence against defendants.

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**COURTS.**

Jurisdiction of, to correct erroneous disposition of void and protested ballots — Supreme Court has no power to order recanvass of ballots.

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Submission of a controversy — question of fact cannot be determined.

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**COVENANTS.**

Of warranty in deed — action upon, to recover amount of dower and costs paid in settlement of action therefor, defended by grantee.

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**CREDITOR'S SUIT.**

Conveyance of lands by father to children in consideration that latter pay income of property to him for life — when decree directing payment of part of income to creditor does not relieve children from contract.

*See CONTRACT, 2.*

**CRIMES.**

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## **CRIMES — Continued.**

**2. Murder — Sufficiency of Evidence — Appeal for Clemency Cannot Be Considered by the Court of Appeals — Application Must Be Made to the Governor.** Where, upon the trial of a defendant indicted for murder, there is evidence sufficient to sustain a verdict convicting the defendant of murder in the first degree, the judgment of conviction must be affirmed; the fact that there are circumstances in the case which tend to lessen the moral guilt of the defendant and should relieve him from suffering the extreme penalty of the law, cannot be taken into consideration by the Court of Appeals; such facts and circumstances must be submitted, on an appeal for clemency, to the governor of the state, to whose judgment, under the Constitution and the law, the whole subject is confided. *People v. Broncado.* 150

**3. Larceny — When Retaining Possession of Goods Delivered under Conditional Sale Does Not Constitute Crime.** Where separate agreements executed at the same time recited, one, that goods consigned were to be returned upon demand, no title to pass; the other, that upon the delivery of the goods the consignee should "deposit" with the consignor a specified sum and thereafter specified weekly sums until the full value of the goods was received, when they should become the property of the consignee, all sums deposited to be the property of the consignor, and if default should be made in any deposit, the latter might deliver to the consignee similar articles equivalent in value to the amount already deposited, and the agreement should then be deemed fulfilled, such agreements must be read together, and so read, constitute a conditional contract of sale (L. 1897, ch. 418, § 10), although each agreement contains a clause that no other agreement should be considered a part thereof. Under such contract, the vendor retains title to the goods and acquires title to all sums paid. Until default in payment, however, the vendee may retain possession. If he defaults, the vendor may demand the return of the goods but must deliver to the vendee similar articles, to the value of the amount paid. A demand unaccompanied by a tender of such articles or of the amount paid does not terminate the contract. The vendee has the right to retain possession of the goods until such tender, and, in the absence thereof, he is not chargeable with larceny for refusing to return them. *People v. Gluck.* 167

**4. Appeal — Unreasonable Delay.** Any unreasonable delay in bringing on for argument an appeal in a criminal case is subversive of public good and a disgrace to the administration of justice. When such delay is wholly the fault of counsel assigned to the defendant and is unexplained it merits severe criticism, and they should not be retained in the position to which they are assigned or thereafter assigned in other criminal actions. *People v. Nelson.* 234

**5. Indecent Publications — Penal Code, § 817.** The word "indecent," as used in section 817 of the Penal Code, relates to obscene prints or publications. It is not an attempt to regulate manners, but it is a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. A publication, therefore, attacking a body of Christian clergymen, although vile, scurrilous and reprehensible, is not indecent unless it is lewd, lascivious, salacious or obscene and has a tendency to excite lustful and lecherous desire. *People v. Eastman.* 478

## **DAMAGES.**

**1. Elements of Damages in Actions for Personal Injuries — When Loss of Income May Be Shown and Considered — Mere Profits of Business Cannot Be Considered.** Where a person by reason of personal injuries has been prevented from performing the work or services in which he was engaged at the time of the injury, the loss of time occasioned thereby and also any loss or diminution of future earning power are elements of damage to be considered by a jury. A loss of income can be shown and

**DAMAGES — *Continued.***

considered when such income is derived from personal effort or particular skill and ability as distinguished from the profits of a business in which capital is invested and which is dependent upon the continuance of the business as well as the capital, but mere profits of a business as such cannot be considered in measuring the damages arising from such loss of time or diminution of earning power. *Weir v. Union Ry. Co.* 416

**2. Erroneous Admission of Evidence Tending to Show Loss of Profits Caused by Personal Injury to Owner of Business.** Where the plaintiff, in an action to recover damages for personal injuries, was engaged at the time of the injury in conducting a small restaurant, or lunch business, at which oysters and clams, opened as they were ordered, were the principal articles of food sold, and there is no evidence showing that any particular skill or ability was required in the management of the business or that the plaintiff had any particular skill or ability in opening oysters and clams or in serving food to others, it is reversible error to permit the plaintiff to testify as to the profits of the business before his injury; the evidence should have been confined to the value of the plaintiff's individual services during the time that he was unable, by reason of his personal injuries, to perform the same. *Id.*

Excessive verdict — questions as to, cannot be considered by Court of Appeals.

*See NEGLIGENCE*, 7.

**DECEDENT'S ESTATE.**

**1. Oral Contract of Decedent to Give All of Her Property to Certain Person — Evidence, When Insufficient to Establish Contract.** In an action brought against the administrator of an estate to compel the specific performance of a contract alleged to have been made between the decedent and the plaintiff, while an infant, whereby the former agreed that upon her death all of her property should pass to the latter in consideration, during the former's life, of the companionship of the latter and the assumption of a child's duties, and the performance of certain other services by the latter, which contract was claimed to have been fully executed by the plaintiff, the burden of proof rests upon the plaintiff to establish by the most convincing evidence that the contract was actually made; and where the only evidence that there ever was any such contract — outside of the fact that plaintiff, when five years of age, was taken from an infants' home or asylum by decedent, with whom she lived as one of decedent's family until her marriage — consists solely of the testimony of certain witnesses of statements or admissions alleged to have been made by decedent relative to the alleged contract at various times, ranging from six to twenty-five years before the trial, assuming that the witnesses were entirely impartial and able to repeat with exact precision what decedent said, and such evidence falls far short of establishing that at some time decedent made with the child a specific contract whereby she bound up the disposition of all her property, present or future, for the consideration alleged, a judgment in favor of plaintiff based solely upon the ground of an express contract cannot be sustained. *Holt v. Tuite.* 17

**2. When Decree of Surrogate Refusing to Allow Executrix Cost of Burial Lot Must Be Sustained.** Where a testator owned a burial lot in the cemetery of an incorporated cemetery association, in which there remained sufficient space for the burial of three more bodies, and the executrix, testator's widow, caused his body to be interred in another lot in the same cemetery which she purchased for that purpose, claiming that testator's son had refused to permit the burial of testator's body in the lot owned by him at the time of his death and that he had also refused to recognize her own right to burial therein, a finding of the surrogate, unanimously affirmed by the Appellate Division, that there was no refusal

**DECEDENT'S ESTATE**—Continued.

by any person or persons, having an interest in said cemetery lot, to allow the burial of decedent, or his widow, in the event of her death, therein, is conclusive upon the Court of Appeals and sustains the propriety of the surrogate's ruling that the purchase price of the second lot was not chargeable against the estate. *Matter of Caldwell.* 115

**3. Same — When Decree of Surrogate Refusing to Allow Executrix Counsel Fees Paid to Attorneys Employed by Her Must Be Sustained — Nomination, by Testator, of Attorneys to Perform Services Necessary in Administration of Estate.** While a finding of the surrogate, unanimously affirmed by the Appellate Division, that the services rendered by an attorney, employed by the executrix, were rendered to her personally rather than as executrix, and that all legal services necessary for the administration of the estate were performed by a firm of lawyers, whom testator assumed to appoint for that purpose by a provision of his will, precludes the Court of Appeals from reviewing a ruling of the surrogate, based upon such finding, which disallowed the amount paid by the executrix to such attorney, it must not be understood therefrom that the appointment of attorneys by the will was binding upon the executors; the law of this state does not recognize any testamentary power to control the attorneys or counsel who shall act for them in their representative capacity; such a provision, therefore, is to be regarded merely as expressive of a wish on the part of a testator, which his executors may observe if it accords with their own judgment, but which otherwise they are not bound to regard. *Id.*

**4. Will — Equitable Conversion Effected by Codicil to Will — When Proceeds of Real Estate Pass under Bequest of Personal Property.** Where testator, by a clause of his will, conferred upon his executors the power to sell and convey any and all of his real estate, and by a codicil thereafter made directed his executors to sell all of his real estate not specifically devised by the will itself and turn the same into money as soon as it might be done for the best interests of his estate; such codicil not only substitutes, for the discretionary power of sale conferred by the will, a positive and absolute direction for the sale of testator's real estate not specifically devised, but also operates as an equitable conversion of the real estate to which it refers and the proceeds thereof should be distributed as personal property under the will; testator's widow is entitled, therefore, to receive one-third of such proceeds, under the clause of the will giving her one-third of testator's personal property, instead of the whole thereof going to testator's son under the residuary clause of the will, by which he devised to his son all of his real and personal estate not specifically bequeathed and devised by prior provisions of the will. *Id.*

When lands owned by firm dealing in real estate deemed to be converted into personality by partnership agreement.

*See PARTNERSHIP, 1-3.*

When property passing under an ante-nuptial contract, whereby a decedent agreed to make a will in favor of the beneficiary named therein is subject to transfer tax.

*See TAX, 4, 5.*

Testamentary trust — suspension of power of alienation — failure to provide for disposition of income and corpus of trust — distribution.

*See TRUSTS, 10, 11.*

**DEED.**

When conveyance of lot fronting on road extending to waters of a navigable river conveys title to roadbed and appurtenant riparian rights.

*See REAL PROPERTY, 4.*

**DEED — *Continued.***

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*See REAL PROPERTY, 5.*

Easement of way.

*See REAL PROPERTY, 6.*

**DEFINITIONS.**

"Indecent publications."

*See CRIMES, 5.*

**DISBARMENT.**

Of attorneys — grounds for.

*See ATTORNEYS, 1-3.*

**DIVIDENDS.**

Cash or stock, representing profits and not capital, go to life beneficiary — stockholders have no right to profits until declaration of dividends.

*See TRUSTS, 1, 2.*

**DOVER.**

Action for, against grantee of land — when grantee may recover amount paid in settlement thereof, from grantor.

*See REAL PROPERTY, 5.*

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*See Slater v. Slater (Mem.), 633.*

**EASEMENTS.**

Right of access — when owner of lots abutting on part of street closed by city has no cause of action for damages.

*See NEW YORK (CITY OF), 3, 4.*

Of way.

*See REAL PROPERTY, 6.*

**ELECTIONS.**

1. *Election Law — Void and Protested Ballots — Jurisdiction of Courts to Correct Erroneous Disposition Thereof.* Where inspectors at a village election, in spite of written and oral protests, received ballots which were not only unofficial, but objected to as marked for identification, and counted them and then caused them to be locked and sealed up with the valid ballots voted at the election, their action was a violation of section 111 of the Election Law (L. 1896, ch. 909), and the Supreme Court has the power and jurisdiction to command that the ballot box containing these void, unofficial and protested ballots should be opened and those ballots removed and placed in a package and disposed of according to the commands of said section, to the end that the proceedings authorized by section 114 of the act may be instituted if any candidate voted for at such election should so desire. *People ex rel. March v. Beam.* 268

2. *Mandamus — When Writ Directing Correction of Errors Made by Inspectors Is Void for Want of Jurisdiction — Supreme Court Has No Power to Order Recanvass of Ballots.* Where a candidate, voted for at such election and declared defeated upon the count of all the ballots voted, official and unofficial and those objected to as marked for identification, institutes proceedings for a peremptory writ of mandamus commanding that the inspectors make a correct canvass and certificate of the result of the election by deducting the votes counted upon the unofficial ballots and upon those marked for identification; that such ballots be indorsed as objected to upon the ground that they were unofficial and marked for identification, and, together with the official ballots, be

**ELECTIONS — *Continued.***

returned as required by section 111 of the Election Law, and that such inspectors do all things necessary to the end that a correct canvass and certificate of said ballots be made in compliance with the Election Law, an order of the Special Term directing a writ of mandamus granting the relief asked for is erroneous, and the writ, in so far as it commands a recanvass of the votes and a proclamation of the result, is void for want of jurisdiction.

*Id.*

*See Matter of O'Brien (Mem.), 585.*

**Invalid Apportionment Act** — next election must be held under new act or under constitutional apportionment of 1894.

*See CONSTITUTIONAL LAW, 9.*

**ELECTRICAL COMPANIES.**

When not entitled to build subways in New York city streets.

*See NEW YORK (CITY OF), 8.*

**ELEVATORS.**

Action to recover for injuries sustained by reason of a fall of elevator.

*See NEGLIGENCE, 1.*

**EMINENT DOMAIN.**

*See Matter of Mayor, etc., of New York (Mem.), 550.*

**ESTATES.**

When evidence insufficient to establish oral contract of decedent to give all of her property to certain person.

*See DECEDEDENT'S ESTATE, 1.*

When refusal of surrogate to allow executrix cost of burial lot and counsel fees proper.

*See DECEDEDENT'S ESTATE, 2, 3.*

When lands owned by firm dealing in real estate deemed to be converted into personality by partnership agreement.

*See PARTNERSHIP, 1-3.*

When property passing under an ante-nuptial contract, whereby a decedent agreed to make a will in favor of the beneficiary named therein is subject to transfer tax.

*See TAX, 4, 5.*

Dividends, cash or stock, representing profits and not capital, go to life beneficiary — stockholders have no right to profits until declaration of dividend — proceeds of subscription rights attached to trust securities go to remaindermen — when trustees not obliged to maintain sinking fund — beneficiary may act as trustee.

*See TRUSTS, 1-6.*

Gift to trustees for charitable purposes — when the trustees, not the Supreme Court, are charged with the duty of executing the trust — when and how trustees may dispose of trust fund before death of life tenant.

*See TRUSTS, 7-9.*

Testamentary trust — suspension of power of alienation — failure to provide for disposition of income and corpus of trust — distribution.

*See TRUSTS, 10, 11.*

Residuary legacy — discretionary power of sale — when absolute title to residuary vestes ests in residuary legatees subject only to discretionary power of sale conferred upon executor — when equitable conversion of testator's realty into personality is not created by express terms of will or

**ESTATES — *Continued.***

by implication — when administrator with will annexed may not maintain action for rents and profits of land owned by testator.

*See WILL, 1, 2.*

When legacy chargeable upon real estate acquired after execution of will.

*See WILL, 3, 4.*

Passive trust — when gift to designated person, in trust for residuary legatees, fails to create a valid active trust — when provision of will suspending division of residuary estate during the minority of "youngest child" not in contravention of statute forbidding suspension of power of alienation.

*See WILL, 5, 6.*

Validity of residuary clause of will — determination of the proportion of residue — when grandnephews included among nephews.

*See WILL, 7-9.*

**EVICTION.**

*See Peacock v. Bailey (Mem.) 607.*

**EVIDENCE.**

1. *Waiver under Section 836, Code Civ. Pro., of Provisions of Section 834, Relating to Patient's Secrets, by Taking Physician's Deposition — When Such Act Is Equivalent to Waiver on the Trial or by Stipulation.* Section 836 of the Code of Civil Procedure, relating to waivers of the provisions of section 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, should be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action, and not to interpose an obstacle to the administration of justice by the suppression of facts already made public by the patient himself in a legal proceeding. While the examination of a witness under a commission cannot be regarded for all purposes as a part of the trial, still the taking of privileged testimony to be used as evidence by either party is so much a part of it as to constitute a waiver made "on the trial;" and where interrogatories and cross-interrogatories are prepared and signed by the attorneys for the respective parties, calling for the precise information which the statute keeps secret unless waived, such acts also constitute a waiver by "stipulation of the attorneys of the respective parties;" the exclusion, therefore, as incompetent of the deposition of plaintiff's physician, offered in evidence by defendant, the plaintiff having failed to introduce it and objected to its introduction upon the ground that it divulged facts which the witness acquired in his capacity as physician, constitutes reversible error. *Clifford v. Denver & R. G. R. R. Co.* 349

2. *When Admissions Contained in a Counterclaim Are Admissible in Evidence Against the Defendants in an Action.* Upon the trial of an action for goods sold and delivered, admissions contained in a counterclaim, forming part of a verified answer, are admissible as evidence against the defendants. While such admissions are not conclusive as against a general denial also contained in the answer, they may be considered, with the other evidence received on the trial, in determining and deciding the issues in the action. *Talbot v. Laubheim.* 421

**EVIDENCE—Continued.**

**3. Witnesses—Code Civ. Pro. § 829—When Interest of Witness in Result of Action too Remote to Disqualify Him from Testifying as to Conversations with a Deceased Defendant.** Where an action was brought against the members of a firm to recover for goods sold and delivered to them, and one of the defendants died after the commencement of the action, and his administrators with will annexed were substituted in his place and stead, the secretary and treasurer of an insolvent corporation whose assets were sold by the sheriff several years previous is not disqualified under the statute (Code Civ. Pro. § 829) from testifying, as a witness for plaintiff, to conversations had with the deceased member of the firm relative to the sale of the goods in question, by reason of the fact that such corporation had been an agent or factor for plaintiff's assignor in such sales, and that if plaintiff failed to recover from defendants because of any mistake or fault on the part of such corporation, the mistake or fault would be chargeable to the corporation. The interest of the witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, is too remote, uncertain and doubtful to make him interested in the event within the meaning of the statute. *Id.*

**4. Payment—When Evidence Tending to Show That a Defendant Had Sufficient Moneys to Make Payments Alleged, Is Admissible to Prove Payment.** Where the plaintiff, upon the trial of an action, brought to recover a balance alleged to be due upon three promissory notes, in which the defense of payment was pleaded, endeavored to show by the cross-examination of defendant that she had not been in possession of sufficient money to pay such balance during the period in which she testified that she had paid it, the evidence of a witness that he had loaned money to defendant at different times during the period in question is competent and admissible to show that the defendant had sufficient moneys to make the payment as alleged. *Dick v. Marvin.* 426

**5. When Defendant May Prove, under a General Denial, Facts Tending to Show That Final Payment Is Not Due upon Building and Loan Contract.** Where an action is brought to recover a final payment claimed to be due upon a building and loan contract, by which the defendant agreed to advance a certain sum toward the erection of a number of houses, such sum to be paid in installments as the work progressed, the defendant to have five days' notice of the completion of the work required for any installment, and the work to be approved by him before the payment of the installment, and if any of the materials or fixtures used in the construction of the buildings should not be purchased or paid for, so that the title thereto should pass upon the delivery thereof at the buildings, the defendant to have the right to withhold any further payments, and the complaint alleged the complete performance of the work in accordance with the contract, to which the defendant interposed a general denial, he is entitled to introduce evidence showing non-performance of the contract; that materials and fixtures were delivered under conditional contracts of sale, or subject to chattel mortgages; and that some of such materials and fixtures had been taken from the buildings with the knowledge or consent of the plaintiff subsequent to the giving of the notice of the completion of the work and during the five days allowed the defendant by contract to ascertain whether the buildings were in such a condition as to warrant him in making the final payment. *Adams v. Lawson.* 480

**6. Evidence—Self-serving Declarations.** In an action to recover for services alleged to have been rendered by plaintiff's testator to the defendants, the admission in evidence of certain entries in diaries of the testator relating to such alleged services is erroneous since they must be regarded as self-serving declarations and are clearly inadmissible. *Burke v. Baker (Mem.).* 561

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Sufficiency of, on trial for murder.  
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Action for personal injuries — when loss of income may be shown and considered as element of damage — erroneous admission of evidence tending to show loss of profits of business.

*See DAMAGES*, 1, 2.

When insufficient to establish oral contract of decedent to give all of her property to certain person.

*See DECEDENT'S ESTATE*, 1.

Tending to show that clerk held office and performed duties of a private secretary, cashier or deputy — when properly excluded on hearing of application for mandamus directing reinstatement.

*See NEW YORK (CITY OF)*, 7.

When testimony as to statements of testator regarding the purpose of trust created by him is competent.

*See TRUSTS*, 9.

When declarations by deceased officer of corporation against his interests are admissible in action against the corporation.

*See VENDOR AND VENDEE*, 2.

**EXECUTORS AND ADMINISTRATORS.**

*See Matter of Title Guarantee & Trust Co.* (Mem.), 542; *Matter of Wagner* (Mem.), 543; *Matter of Mitchell* (Mem.), 567; *Matter of Wiley* (Mem.), 579; *Matter of Tiffany* (Mem.), 583; *Matter of Hirsh* (Mem.), 584; *Matter of Thieriot* (Mem.), 589; *Matter of King* (Mem.), 626.

When refusal of surrogate to allow executrix cost of burial lot and counsel fees proper.

*See DECEDENT'S ESTATE*, 2, 3.

When administrator with the will annexed may not maintain action for rent and profits of land owned by testator.

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*See Cramsey v. Sterling* (Mem.), 602.

**FIRE INSURANCE.**

Payment of premium on policy — cancellation of policy — voluntary surrender of policy — waiver.

*See INSURANCE*, 1, 2.

**FORECLOSURE.**

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**FRANCHISES.**

Sale of franchise by receiver to an individual — voluntary assignment of franchise by corporation to an individual.

*See CORPORATIONS*, 1, 2.

**GAS COMPANIES.**

*Reasonableness of Price Fixed by Statute—Transportation Corporations Law (L. 1890, Ch. 566), § 70—New York City.* Where the price of a commodity is established by law (in this case illuminating gas furnished to the city of New York in the borough of Brooklyn), whatever price the legislature permits to be charged must be deemed to be reasonable, and when the seller makes a charge of less than the maximum, the purchaser cannot resist payment upon the ground that the statute has permitted an unreasonable charge. *Brooklyn Union Gas Co. v. City of New York.* 834

**GENEVA (CITY OF.)**

Assessed value of stock of bank located in, must be included in aggregate amount of taxable property for purpose of fixing amount of general tax to be levied on city.

*See TAX, 1-8.*

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*See Keens v. Newark W. C. M. Co. (Mem.), 598; Phillips v. Lindley (Mem.), 606; Ladd v. Title Guaranty & Trust Co. (Mem.), 616.*

**HABEAS CORPUS.**

*See People ex rel. Weick v. Warden, etc. (Mem.), 549; Matter of Harding (Mem.), 583.*

Incidental order not reviewable by Appellate Division.

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What constitute.

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*See NEGLIGENCE, 2-6.*

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1. *Fire Insurance—Payment of Premium on Policy—When Credit Given to Insured by Agent Regarded as Payment to Company.* Where the general agent of a fire insurance company at the time of issuing a policy, gives credit to the insured for the premium due on the policy, and the amount thereof is charged by the company to the agent who pays it in a subsequent settlement with the company, the premium, as between the company and the insured, must be regarded as paid. *Buckley v. Citizens' Ins. Co.* 399

2. *Cancellation of Policy—Voluntary and Unconditional Surrender of Policy Subsequent to Notice of Cancellation—When Regarded as a Waiver of Requirement That Unearned Premiums Must Be Paid or Tendered Before Policy Can Be Canceled.* Under the provisions of the New York standard policy of fire insurance relating to the cancellation of the policy, if the insurance company desires to cancel the policy, it must not only give the five days' notice therein required but accompany it by the payment or tender of the *pro rata* amount of the unearned premium; it cannot legally demand of the insured the surrender of the policy and its cancellation until this is done; but where the agent who issued the policy in question sent the

**COSTS — *Continued.***

2. *Same.* An extra allowance is improperly granted in an action upon contract for the recovery of money only, to which a counterclaim was interposed, where the case was disposed of by stipulation in a manner favorable to both parties, by reason of a former judgment rendered in another state upon the same cause of action between the same parties, and they, therefore, in effect, settled the controversy without trial. *Id.*

In summary proceedings.

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**COUNTERCLAIM.**

When admissions in, are admissible in evidence against defendants.

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What question of law may be reviewed by, on appeal from order of Appellate Division reversing judgment on question of law only and granting new trial.

*See APPEAL, 1.*

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Jurisdiction of, to correct erroneous disposition of void and protested ballots — Supreme Court has no power to order recanvass of ballots.

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Submission of a controversy — question of fact cannot be determined.

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**COVENANTS.**

Of warranty in deed — action upon, to recover amount of dower and costs paid in settlement of action therefor, defended by grantee.

*See REAL PROPERTY, 5.*

**CREDITOR'S SUIT.**

Conveyance of lands by father to children in consideration that latter pay income of property to him for life — when decree directing payment of part of income to creditor does not relieve children from contract.

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### **DAMAGES.**

*1. Elements of Damages in Actions for Personal Injuries — When Loss of Income May Be Shown and Considered — Mere Profits of Business Cannot Be Considered.* Where a person by reason of personal injuries has been prevented from performing the work or services in which he was engaged at the time of the injury, the loss of time occasioned thereby and also any loss or diminution of future earning power are elements of damage to be considered by a jury. A loss of income can be shown and

**DAMAGES—Continued.**

considered when such income is derived from personal effort or particular skill and ability as distinguished from the profits of a business in which capital is invested and which is dependent upon the continuance of the business as well as the capital, but mere profits of a business as such cannot be considered in measuring the damages arising from such loss of time or diminution of earning power. *Weir v. Union Ry. Co.* 416

2. *Erroneous Admission of Evidence Tending to Show Loss of Profits Caused by Personal Injury to Owner of Business.* Where the plaintiff, in an action to recover damages for personal injuries, was engaged at the time of the injury in conducting a small restaurant, or lunch business, at which oysters and clams, opened as they were ordered, were the principal articles of food sold, and there is no evidence showing that any particular skill or ability was required in the management of the business or that the plaintiff had any particular skill or ability in opening oysters and clams or in serving food to others, it is reversible error to permit the plaintiff to testify as to the profits of the business before his injury; the evidence should have been confined to the value of the plaintiff's individual services during the time that he was unable, by reason of his personal injuries, to perform the same. *Id.*

Excessive verdict — questions as to, cannot be considered by Court of Appeals.

*See NEGLIGENCE, 7.*

**DECEDENT'S ESTATE.**

1. *Oral Contract of Decedent to Give All of Her Property to Certain Person—Evidence, When Insufficient to Establish Contract.* In an action brought against the administrator of an estate to compel the specific performance of a contract alleged to have been made between the decedent and the plaintiff, while an infant, whereby the former agreed that upon her death all of her property should pass to the latter in consideration, during the former's life, of the companionship of the latter and the assumption of a child's duties, and the performance of certain other services by the latter, which contract was claimed to have been fully executed by the plaintiff, the burden of proof rests upon the plaintiff to establish by the most convincing evidence that the contract was actually made; and where the only evidence that there ever was any such contract — outside of the fact that plaintiff, when five years of age, was taken from an infants' home or asylum by decedent, with whom she lived as one of decedent's family until her marriage — consists solely of the testimony of certain witnesses of statements or admissions alleged to have been made by decedent relative to the alleged contract at various times, ranging from six to twenty-five years before the trial, assuming that the witnesses were entirely impartial and able to repeat with exact precision what decedent said, and such evidence falls far short of establishing that at some time decedent made with the child a specific contract whereby she bound up the disposition of all her property, present or future, for the consideration alleged, a judgment in favor of plaintiff based solely upon the ground of an express contract cannot be sustained. *Holt v. Tuite.* 17

2. *When Decree of Surrogate Refusing to Allow Executrix Cost of Burial Lot Must Be Sustained.* Where a testator owned a burial lot in the cemetery of an incorporated cemetery association, in which there remained sufficient space for the burial of three more bodies, and the executrix, testator's widow, caused his body to be interred in another lot in the same cemetery which she purchased for that purpose, claiming that testator's son had refused to permit the burial of testator's body in the lot owned by him at the time of his death and that he had also refused to recognize her own right to burial therein, a finding of the surrogate, unanimously affirmed by the Appellate Division, that there was no refusal

**DECEDENT'S ESTATE — *Continued.***

by any person or persons, having an interest in said cemetery lot, to allow the burial of decedent, or his widow, in the event of her death, therein, is conclusive upon the Court of Appeals and sustains the propriety of the surrogate's ruling that the purchase price of the second lot was not chargeable against the estate. *Matter of Caldwell.* 115

**3. Same — When Decree of Surrogate Refusing to Allow Executrix Counsel Fees Paid to Attorneys Employed by Her Must Be Sustained — Nomination, by Testator, of Attorneys to Perform Services Necessary in Administration of Estate.** While a finding of the surrogate, unanimously affirmed by the Appellate Division, that the services rendered by an attorney, employed by the executrix, were rendered to her personally rather than as executrix, and that all legal services necessary for the administration of the estate were performed by a firm of lawyers, whom testator assumed to appoint for that purpose by a provision of his will, precludes the Court of Appeals from reviewing a ruling of the surrogate, based upon such finding, which disallowed the amount paid by the executrix to such attorney, it must not be understood therefrom that the appointment of attorneys by the will was binding upon the executors; the law of this state does not recognize any testamentary power to control the attorneys or counsel who shall act for them in their representative capacity; such a provision, therefore, is to be regarded merely as expressive of a wish on the part of a testator, which his executors may observe if it accords with their own judgment, but which otherwise they are not bound to regard. *Id.*

**4. Will — Equitable Conversion Effected by Codicil to Will — When Proceeds of Real Estate Pass under Bequest of Personal Property.** Where testator, by a clause of his will, conferred upon his executors the power to sell and convey any and all of his real estate, and by a codicil thereafter made directed his executors to sell all of his real estate not specifically devised by the will itself and turn the same into money as soon as it might be done for the best interests of his estate; such codicil not only substitutes, for the discretionary power of sale conferred by the will, a positive and absolute direction for the sale of testator's real estate not specifically devised, but also operates as an equitable conversion of the real estate to which it refers and the proceeds thereof should be distributed as personal property under the will; testator's widow is entitled, therefore, to receive one-third of such proceeds, under the clause of the will giving her one-third of testator's personal property, instead of the whole thereof going to testator's son under the residuary clause of the will, by which he devised to his son all of his real and personal estate not specifically bequeathed and devised by prior provisions of the will. *Id.*

When lands owned by firm dealing in real estate deemed to be converted into personality by partnership agreement.

*See PARTNERSHIP, 1-3.*

When property passing under an ante-nuptial contract, whereby a decedent agreed to make a will in favor of the beneficiary named therein is subject to transfer tax.

*See TAX, 4, 5.*

Testamentary trust — suspension of power of alienation — failure to provide for disposition of income and corpus of trust — distribution.

*See TRUSTS, 10, 11.*

**DEED.**

When conveyance of lot fronting on road extending to waters of a navigable river conveys title to roadbed and appurtenant riparian rights.

*See REAL PROPERTY, 4.*

**MUNICIPAL CORPORATIONS — *Continued.***

fence at the top of the embankment and fell to the railroad tracks below, where several of the party were struck by a passing train and killed, and in an action brought against the city of New York to recover for the death of one of those killed in such accident, there is evidence that there was nothing at the point of the intersection of the street with the *cul de sac* to indicate that the latter terminated in a dangerous declivity a few hundred feet away, except the electric lights at the point of intersection and at other points along the *cul de sac*, and there is evidence that such lights were insufficient to show the guard rail and fence at the end of the *cul de sac*, and also that, a short time previous, another automobile had crashed into the fence under similar circumstances and the accident had been reported at a police station, the question whether the city had provided sufficient light to enable a traveler at night to discern the guard rail and fence, and to be aware of the danger in time to avert accident, is one of fact for a jury; a judgment dismissing the complaint is erroneous, therefore, and must be reversed, since the situation was such as would have warranted the jury in deciding that a traveler, although exercising reasonable prudence and foresight, might meet with an accident as such place in the absence of more effective safeguards than those furnished by the defendant. *Id.*

4. *Same — Contributory Negligence — When Question Whether Automobile Was Operated with Due Care and Caution One of Fact.* Where it is shown that the automobile was going at the rate of eight or ten miles an hour, and that the operator was experienced and careful, although there is evidence tending to show that the automobile could have been stopped within eighteen or twenty feet and that the fence at the foot of the *cul de sac* could have been seen at a distance of fifteen feet, the question of contributory negligence is also one of fact for the jury, since the plaintiff is entitled to the benefit of the legal principle that a traveler on a city street has the right to assume that all the parts thereof intended for travel are safe, and he is not open to the imputation of negligence if he fails to discern an unknown and concealed danger at the very instant necessary to prevent an impending disaster. *Id.*

5. *When Destruction of Building by Crowd Does Not Constitute Riot and Render City Liable for Damages under General Municipal Law.* The destruction of an unoccupied frame building by a varying crowd of young men and boys numbering from eight to thirty, there being no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance, but on the contrary, it appearing that when a policeman approached, the crowd ran away, does not constitute the offenders guilty of riot within the meaning of section 449 of the Penal Code, so as to entitle the owner to recover from a municipality the value of the building under section 21 the General Municipal Law (L. 1892, ch. 685), providing that a city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby. *Adamson v. City of New York.* 255

Contract to purchase real estate — when cannot be specifically enforced.  
*See CONTRACT, 3.*

When electrical companies not entitled to build subways in streets.  
*See NEW YORK (CITY OF), 8.*

**MURDER.**

Sufficiency of evidence.

*See CRIMES, 1.*

Sufficiency of evidence — appeal for clemency cannot be considered by the Court of Appeals.

*See CRIMES, 2.*

**NEGLIGENCE.**

*1. Action by Servant to Recover for Injuries Caused by Negligence of Employer's Superintendent—Sufficiency of Allegations of Complaint.* Where, in an action brought by an employee of a foreign corporation to recover for injuries sustained by him by reason of the fall of a defective and unsafe elevator, constructed by and then being operated under the supervision and control of the defendant, which the plaintiff had entered in obedience to orders of the defendant's superintendent, the complaint states all the facts necessary to be proved to establish that the negligence which occasioned the happening of the accident was that of defendant's superintendent and then alleges that "within 120 days after the occurrence of said accident \* \* \* and on the 18th day of March, 1903, due notice in writing of the time, place and cause of the injury was given in the manner provided by and pursuant to chapter 600 of the Laws of 1902," such complaint states facts sufficient to constitute a cause of action under the Employers' Liability Act. *Harris v. Baltimore M. & Elev. Works.* 141

*2. Infant—Degree of Care Required Therefrom.* A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence. *Seruno v. N. Y. C. & H. R. R. Co.* 156

*3. When Negligence Cannot Be Imputed to Parents as Matter of Law in Permitting Child to Cross Railroad Tracks Unattended.* It is not negligence as a matter of law for the parents of an intelligent child, somewhat less than six years old, to let her go into the streets in the neighborhood of a railroad crossing unattended, where the child had attended school for about a year and had been accustomed to cross the railroad tracks at the street crossing without attendants and had been told by both parents that in crossing the railroad tracks she should be very careful to look up and down the tracks before crossing to see if a train was coming. *Id.*

*4. Contributory Negligence—When It Cannot Be Imputed, as a Matter of Law, to Child Injured by Train at Railroad Crossing.* Where it appears, upon the trial of an action to recover for injuries sustained by a child struck by a locomotive while crossing the tracks of a railroad at a street crossing, that the tracks crossed the street at a curve so abrupt that a locomotive approaching from the east could not be seen until within one hundred feet from the crossing; that, just before the child attempted to cross the tracks, an east-bound train passed over the crossing, obscuring the view to the east, making much noise and leaving behind it a cloud of smoke and steam, and that the child waited for such train to pass, and after looking both ways started to cross the tracks and was struck by a west-bound train, and the evidence is conflicting as to the speed of the train and as to whether the bell was rung or any other warning given, it cannot be held, as a matter of law, that the child was guilty of contributory negligence, and the question of the defendant's negligence is a question of fact, properly submitted to the jury. *Id.*

*5. Questions Whether Infant Is Sui Juris—Negligence of Parents in Permitting Child to Cross Railroad Tracks Unattended—When Properly Submitted to Jury.* Where all of the questions involved, including the questions whether the child was *sui juris* or not and whether the parents were guilty of negligence in permitting her to cross the railroad tracks unattended, were submitted to the jury, a statement of the court, that, if the jury found that the child exercised such care as would be required of an adult under similar circumstances, any negligence on the part of the parents was not imputable to the child, is not erroneous, since, if a child is capable of exercising the care that is required of an ordinarily prudent person of full age, and such child does exercise such care, the suggestion of negligence on the part of the parents imputable to the child is wholly

**NEGLIGENCE—Continued.**

negatived. The imputed negligence of the parents is wholly based upon the inability of the child to exercise the care and prudence of an adult. *Id.*

**6. Speed of Railroad Train at Crossing—When Properly Submitted to Jury—Instructions to Jury.** An instruction, in such charge, that if the jury found the speed of the train was from fifteen to twenty-five miles an hour and they also found that to be a dangerous and excessive rate of speed in the locality of this crossing that they might then find the defendant guilty of negligence, is not erroneous, since in the absence of signals or safeguards by way of gates or flagmen, a speed of from fifteen to twenty-five miles an hour around a very abrupt curve at a much-used crossing in a city is some evidence to submit to a jury on the question of defendant's negligence. *Id.*

**7. Damages—Excessive Verdict.** A determination of the Appellate Division upon the question whether the damages found by the jury are excessive or not is not revivable in the Court of Appeals, since the court cannot consider the weight of evidence or questions relating to an excessive verdict. *Id.*

**8. Master and Servant—Safe Appliances.** An employee who is injured while riding in a "skip" or iron box used in hoisting ore out of a mine, and not intended for passengers, cannot recover damages where the master has provided a safe method of egress from the mine, unless he shows that he was directed to so ride by his superior, or that it had been the custom of the employees to thus use it to the knowledge of the master; nor can a recovery be had in any event in the absence of proof showing some defect either in the appliances or method of construction, and a master is not bound to anticipate that an employee riding in such a "skip" will permit any part of his person to extend beyond its sides. *Burns v. Old Sterling I. & M. Co.* 175

**9. Best Known Appliances.** A master is not bound to use the best known appliances, but only such as are reasonably fit and proper. *Id.*

**10. Contributory Negligence.** A refusal to charge in an action of negligence, that if the jury believed that the decedent attempted to cross tracks five or six feet ahead of a horse car approaching at a speed of three-miles an hour, its verdict must be for the defendant, constitutes reversible error. *Bambace v. Interurban St. Ry. Co.* 288

**11. Safety of Working Place—Negligence..** The rule, that it is the duty of the master to furnish his servants with a reasonably safe place to work in, has no application when the danger to which his servants are exposed is due to the manner in which the work is prosecuted. *Citrone v. O'Rourke Eng. Const. Co.* 339

**12. Master and Servant—Safety of Working Place—Fall of Embankment.** Where one of a gang of workmen, employed by a railroad company under the direction of a competent foreman, in the excavation of a gravel bank with a steam shovel, which was moved forward on a temporary track as the bank was shoveled away, was injured by the caving in of an overhanging part of the bank, he cannot recover upon the theory that the company failed to furnish a safe place for its servants to work in, since the place where the men were to work changed from day to day, as the steam shovel moved on in its operations, and was necessarily such as the conformation of the embankment and the process of excavation made it; while the caving in of the embankment was an ever present possibility which required the exercise of active vigilance to guard against, the company had the right to delegate that duty to a foreman, and having furnished a concededly competent foreman, it is not liable

**NEGLIGENCE—Continued.**

for his negligence, or error in judgment, if any, in failing to perform that duty. *Russell v. Lehigh Valley R. R. Co.* 344

*Id.*

13. *When Failure to Furnish Explosives to Break Down Top of Overhanging Embankment Does Not Constitute Negligence of Master.* The fact that the company had not furnished explosives, with the tools and other appliances provided, to break down the overhanging top of the embankment after the earth beneath had been taken away by the steam shovel, does not render the company liable where there is no evidence that explosives were demanded by the situation; that they were deemed necessary by the foreman, or would have been used by him, if furnished, and the evidence shows that no attempt was made before the accident, or at any other time, to pry off the top of the embankment with the tools and appliances furnished for that purpose; so that the negligence, if any there was, was that of the foreman, a fellow-servant of the plaintiff, and not that of the company. *Id.*

14. *Fall of Building Caused by Alleged Negligence of Several Contractors.* The evidence examined in an action to recover the value of property injured or partially destroyed by the fall of a building containing plaintiff's shop, caused by the alleged negligence of the defendants, who were various contractors, engaged in the erection of an adjoining building, and held insufficient to sustain a recovery. *Milbaur v. Richard.* 453

15. *Liability of Bill Posting Company for Injuries Caused by Fall of Signboard.* A bill posting company which had the right to maintain a bill board or sign on the roof of a building under a formal lease from the tenant in possession thereof, in which the company agreed to keep the roof where the board was erected in good repair and to indemnify the tenant in possession of the building from any and all damages and claims that he might be liable for in consequence of the maintenance of the board, is liable for personal injuries resulting from the fall or blowing down of the board by reason of the careless or unsafe manner in which it had been erected. *San Filippo v. Am. Bill Posting Co.* 514

*See Smith v. Lehigh Valley R. R. Co.* (Mem.), 545; *Odell v. N. Y. C. & H. R. R. Co.* (Mem.), 548; *McAuley v. N. Y. C. & H. R. R. Co.* (Mem.), 554; *Brown v. N. Y. C. & H. R. R. Co.* (Mem.), 555; *McManus v. St. Regis Paper Co.* (Mem.), 556; *Ware v. Ithaca St. Ry. Co.* (Mem.), 556; *Deegan v. Syracuse Lighting Co.* (Mem.), 557; *Hull v. N. Y. C. & H. R. R. Co.* (Mem.), 558; *Makin v. Pettebone C. P. Co.* (Mem.), 559; *Ryan v. D. & H. Co.* (Mem.), 559; *Hacker v. O'Rourke Engineering Cons. Co.* (Mem.), 563; *Coloman v. N. Y. C. & H. R. R. Co.* (Mem.), 564; *Scheel v. Mut. Milk & Cream Co.* (Mem.), 564; *Petin v. N. Y. C. & H. R. R. Co.* (Mem.), 565; *Myers v. Town of Gates* (Mem.), 570; *Laturen v. Bolton Drug Co.* (Mem.), 574; *Stanton v. International Ry. Co.* (Mem.) 591; *Kopper v. City of Yonkers* (Mem.), 592; *Poland v. United Traction Co.* (Mem.), 593; *Halloran v. Straus* (Mem.), 594; *Kohm v. Interborough R. T. Co.* (Mem.), 598; *Nichols v. City of New Rochelle* (Mem.), 599; *Klein v. Garvey* (Mem.), 600; *Arcieri v. Long Island R. R. Co.* (Mem.), 601; *Hynds v. Brooklyn Heights R. R. Co.* (Mem.), 603; *Mathers v. Interurban St. Ry. Co.* (Mem.), 610; *Lane v. N. Y. C. & H. R. R. Co.* (Mem.), 613; *Bissell v. Sackett W. B. Co.* (Mem.), 613; *Barr v. N. Y. C. & H. R. R. Co.* (Mem.), 615; *Conlon v. City of New York* (Mem.), 619; *Weir v. Union Ry. Co.* (Mem.), 622; *Keating v. Coon* (Mem.), 624; *Wilson v. Met. St. Ry. Co.* (Mem.), 627; *Lomas v. New York City Ry. Co.* (Mem.), 628; *Kushner v. Ginsberg* (Mem.), 630; *Derby v. Degnon-McLean Cont. Co.* (Mem.), 631; *Lynch v. Shanley Co.* (Mem.), 634; *Hooley v. Niagara Falls Milling Co.* (Mem.), 638; *Rosenthal v. N. Y., S. & W. R. R. Co.* (Mem.), 639.

**NEGLIGENCE—Continued.**

Action for personal injuries—elements of damage.

*See DAMAGES*, 1, 2.

Of city in failing to keep its streets free from dangerous defects—use of automobiles upon city streets.

*See MUNICIPAL CORPORATIONS*, 1-4.

Action for, under Employers' Liability Act.

*See PLEADING*.

**NEW YORK (CITY OF).**

1. *When City May Close Public Streets—Powers of Board of Estimate and Apportionment—Greater New York Charter, Section 442.* Under the Greater New York charter (L. 1901, ch. 466, § 442, as amd. by L. 1903, ch. 409) and upon compliance with the steps therein prescribed, the board of estimate and apportionment has the power, with the approval of the mayor, to change the map or plan of the city by closing an existing street; under such provisions it may close a street, never actually opened or used as a public street, although laid out as a proposed street upon an official map of streets and avenues proposed to be opened as public streets and avenues of a certain township, by commissioners appointed pursuant to law, which map, by force of the annexation and consolidation acts, became a part of the map of the greater city of New York, where, after the consolidation and in pursuance of a resolution of the board of estimate and apportionment, proceedings were instituted to open the street, and thereafter the board by a resolution, adopted in conformity with section 980 of the charter, directed that the title to the property required for the street should be vested in the city of New York. *Reis v. City of New York.*

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2. *Same—When Proceeding to Close Public Street Need Not Originate in Local Board of District in Which Street Is Situated—Construction of Sections 428, 432, 438 and 434 of Greater New York Charter.* The closing of such street by the board of estimate and apportionment with the approval of the mayor is not irregular and invalid because the proceeding did not originate with the local board of the district in which the street is located, as required by the provisions of the charter (L. 1901, ch. 466, §§ 428, 432, 438 and 434) relating to proceedings "to open, close \* \* \* and repair the streets, avenues and public places \* \* \* within the district;" the legislature intended, by these provisions, to confer upon the local boards the authority to deal in the first instance with applications for local improvements made to them by *petition*, but meant to commit to the jurisdiction of the board of estimate and apportionment, with the co-operation of the chief executive of the city, the power of its own volition to initiate and carry through such public improvements as they should deem for the best interests of the city at large, irrespective of any action or lack of action by the subordinate local boards.

*Id.*

3. *Same—When Owner of Lots Abutting on Part of Street Closed by City of New York, Under Section 442 of the Charter, Has No Cause of Action for Damages to Her Public Easement of Right of Access.* Where the city of New York, owning all the lots abutting on a certain street, between two streets running at right angles thereto, together with all the right, title and interest which its grantors had in such street, has closed the street, under and in compliance with the provisions of the charter relating thereto (L. 1901, ch. 466, § 442, as amd. by L. 1903, ch. 409), between the intersecting streets, and erected a building thereon for hospital purposes, the owner of lots abutting on the same street, but in the two next adjacent blocks, facing on the street, has suffered and can suffer no actionable damage, so far as any of her public easements are

**NEW YORK (CITY OF) — *Continued.***

concerned, by the closing of the street, when it is not intended to close any part of the street upon which any of her property abuts, or any part thereof which is opposite a block in which she owns property, and the closing and discontinuance of the street will still leave all of her lots accessible by public ways. *Id.*

**4. Same — *Private Easement of Right of Access to and Through a Public Street, Originating from Dedication of Street by Lot Owner's Grantor — Extent and Limitation of Such Easement.*** While the fact, that the conveyances to such lot owner and to the city originated in a common grantor and were made with reference to a map of grantor's property upon which the street in question was laid out and thereby dedicated as a public street, entitles such lot owner to a private easement in the street for the purpose of access, which is a property right of which she cannot be deprived, nevertheless such private easement does not thereby extend to and through the whole of the street as shown on the original grantor's map; it can only extend to the next cross street or avenue on each side of the lots owned by her, and she is entitled, in the first place, to have that part of the street upon which her own property abuts kept open, and, in the second place, to have that part or block of the street which borders her premises kept open at both ends where it is crossed by and opens into intersecting streets. *Id.*

**5. Civil Service Law — *When Clerk Removed from Position in Office of Coroner of Borough of Richmond Entitled to Mandamus Directing His Reinstatement.*** Where a member of a disbanded volunteer fire department in the county of Richmond was appointed as a clerk in the office of the coroner of the borough of Richmond under the authority of section 1571 of the Greater New York charter, which provides that "The coroners in each borough shall have an office in said borough and shall appoint a clerk who shall receive an annual salary to be fixed by the board of estimate and apportionment and the board of aldermen, and such and so many assistant clerks as shall be provided for in the annual budget. They shall also appoint a stenographer in each borough," etc., such clerk was not appointed to and did not hold a public office, but held a clerical and subordinate position without original, independent or governmental duties, and having been removed and dismissed from such position without any hearing whatever, as required by the Civil Service Law (L. 1899, ch. 370, § 21, as amd. by L. 1904, ch. 697), he is entitled, in the absence of evidence that he held "the position of private secretary, cashier or deputy of any official or department," which positions are excepted from the requirements of the latter statute, to a peremptory writ of mandamus requiring the coroner of the borough of Richmond to reinstate him in the position from which he was removed and he is not compelled to resort to an action of quo warranto. *People ex rel. Hoeple v. Cahill.* 489

**6. When Fact That Statute Authorizing Appointment of Such Clerk Prescribes No Definite Term, Does Not Authorize His Removal at Pleasure of Coroner.** The fact that the statute under which the relator was appointed, prescribed no definite term of office, did not render his term of office subject to the pleasure of his superior so that he could be removed at any time; while the statute does not fix the term of appointment, it must be construed with reference to the Civil Service Law, which also applies and prohibits the removal of the relator except under the conditions therein specified. *Id.*

**7. When Evidence Tending to Show That Such Clerk Held the Office, or Performed the Duties, of a Private Secretary, Cashier or Deputy, Properly Excluded.** Where the defendant, upon the hearing of the proceedings for the writ of mandamus, offered evidence intended to show that the duties discharged by the successor of relator were those of deputy, cashier or private secretary, and that, therefore, the position came within the excep-

**NEW YORK (CITY OF) — *Continued.***

tions of section 21 of the Civil Service Law, such evidence was incompetent and properly excluded for the reason, amongst others, that, when the statute excepted from the limitations upon the power to remove certain persons like relator the office of deputy, cashier or private secretary, it contemplated only positions brought within these excepted classes by the terms of the laws which created or authorized and defined them, or at the most positions which under some sufficient authority at the discretion of the appointing or superior power have been invested with the duties and character of one of the excepted positions. It was not the purpose to allow the head of a department at will by assigning temporarily certain duties to a position created as an ordinary clerkship, to transform it into the office of private secretary, cashier or deputy and thus secure the power of removal, free from the restrictions imposed by the statute. *Id.*

**8. New York Electric Lines Company Not Entitled to Build Independent Subways in City of New York.** The principal, fundamental and essential purpose of the incorporation of the New York Electric Lines Company is to construct, use and maintain lines of wire for conducting electricity. The conduits in which the wires are to be laid are mere incidents to such purpose. The acts of 1885 and 1887 (L. 1885, ch. 439; L. 1887, ch. 716), relating to the placing of electrical conductors under ground in cities of this state, are proper police regulations which the legislature had the power to enact and impair no contract right of the New York Electric Lines Company, although such company, by chapter 483 of the Laws of 1881, was entitled to lay electric conductors under ground in the streets of cities upon securing permission from the common council of the city, and had secured such permission; having failed to take advantage thereof before the passage of such acts, it must comply with their provisions and with the plans adopted thereunder for the purpose of placing electrical conductors under ground. It was the duty of the commissioner of water supply, gas and electricity, therefore, to deny an application of said company for permission to open the streets of the city to construct an independent line of subways or conduits for the purpose of laying electric conductors therein. *People ex rel. N. Y. El. Lines Co. v. Ellison.* 523

*See Brooklyn U. E. R. R. Co. v. City of New York* (Mem.), 615.

Mandamus to compel grant of space in subway — consent of commissioners of electricity need not precede application for space.

*See CORPORATIONS*, 3.

Reasonableness of price of gas in.

*See GAS COMPANIES.*

Duty of city to keep its streets free from dangerous defects — use of automobiles upon city streets.

*See MUNICIPAL CORPORATIONS*, 1-4.

When destruction of building by crowd does not constitute riot and render city liable.

*See MUNICIPAL CORPORATIONS*, 5.

**NOTICE.**

Of claim for damages from change in grade of street to abolish railroad crossing must be filed with board of railroad commissioners.

*See STREETS.*

**NUISANCE.**

*See Bly v. Edison El. Ill. Co.* (Mem.), 582; *Rock v. Acker Process Co.* (Mem.), 604.

**PARTITION.**

*See Frey v. Fougera* (Mem.), 569; *Place v. Kennedy* (Mem.), 590.

**PARTNERSHIP.**

1. *When Lands Owned by Firm Dealing in Real Estate Deemed to Be Converted into Personality by Partnership Agreement.* Where a partnership formed for that purpose has carried on the business of dealing in real estate as a commodity, buying it absolutely for the purpose of improving and selling it and either dividing the proceeds of the sale amongst the partners or reinvesting it in more real estate to be similarly dealt with, carrying it upon the firm books indiscriminately with personal property as part of the assets of the firm, and this course of conduct is in accordance with and confirmatory of an oral agreement for a copartnership and for a conversion of the real estate into personality upon dissolution of the firm or disagreement of the partners, a trial court is justified in finding as a matter of fact an implied intention and agreement upon the part of the copartners that there shall be a conversion of their real estate into personality for all purposes, and that such intention and agreement will apply to real estate happening to be undisposed of at the death of one of the copartners upon a distribution of his estate as between his heirs at law and personal representatives. *Buckley v. Doig.* 288

2. *When Such Conversion Not in Conflict with Real Property Law* (L. 1896, Ch. 547, § 207). A partnership for dealing in real estate may be created by parole and the question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personality is incidental to the relation of copartnership. Its disposition is governed by the agreement, express or implied from the acts of the copartners, and the finding of an intention for a conversion does not conflict either with the spirit or the letter of the statute (Real Property Law [L. 1896, ch. 547], § 207), which provides that "An estate or interest in real property, \* \* \* or any trust or power over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same." *Id.*

3. *Evidence — Effect of Exchange of Deeds Between Partners.* Where it appears that a short time before the death of one of two copartners carrying on business under such agreement, and in view of his apprehended death, deeds were passed between the partners so as to invest each one upon the record with a half interest in each parcel of land then on hand and which included some, or all, of the lands remaining after the death of such partner, that fact does not conclusively indicate an intent that the real estate, held by the firm, should be regarded as such and not as personality, where other inferences are deducible therefrom and no change was made upon the partnership books whereby the real estate was charged up to the respective partners in accordance with the deeds which were executed or in any manner withdrawn from the copartnership agreement and arrangements as they had always existed. *Id.*

*See Brady v. Powers* (Mem.), 626; *Whittaker v. Stafford* (Mem.), 637.

**PAYMENT.**

When evidence tending to show that a defendant had sufficient moneys to make payments alleged is admissible to prove payment.

*See EVIDENCE*, 4.

Final payment upon building and loan contract — facts tending to show it not due.

*See EVIDENCE*, 5.

Of premium on fire insurance policy.

*See INSURANCE*, 1.

**PENAL CODE.**

1. § 317 — *Crimes — Indecent Publications.* The word "indecent," as used in section 317 of the Penal Code, relates to obscene prints or publications. It is not an attempt to regulate manners, but it is a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. A publication, therefore, attacking a body of Christian clergymen, although vile, scurrilous and reprehensible, is not indecent unless it is lewd, lascivious, salacious or obscene and has a tendency to excite lustful and lecherous desire. *People v. Eastman.* 478

2. § 368b — *Disbarment — Practicing under Name of Disbarred Attorney.* An attorney who continues to practice under the name of a firm by which he was employed as a clerk, one member of which is dead and the other disbarred, is guilty of unprofessional conduct justifying his disbarment; he is not protected by the Partnership Law (L. 1897, ch. 420, § 20), and by filing, under an arrangement with the disbarred partner to continue his trade name and practice, a certificate with the county clerk to the effect that he is continuing the business under the name of the firm in compliance with section 368b of the Penal Code; those provisions must be read in connection with those of section 72 of the Code of Civil Procedure, and so read, such attorney not only became liable for the penalties therein provided, but he attempted to nullify the order of the court by arranging to do for the disbarred partner in his name that which the court prohibited such partner from doing himself. *Matter of Kaffenburgh.* 49

3. § 449 — *Municipal Corporations — When Destruction of Building by Crowd Does Not Constitute Riot and Render City Liable for Damages under General Municipal Law.* The destruction of an unoccupied frame building by a varying crowd of young men and boys numbering from eight to thirty, there being no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance, but on the contrary, it appearing that when a policeman approached, the crowd ran away, does not constitute the offenders guilty of riot within the meaning of section 449 of the Penal Code, so as to entitle the owner to recover from a municipality the value of the building under section 21 of the General Municipal Law (L. 1892, ch. 685), providing that a city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby. *Adamson v. City of New York.* 255

**PHYSICIANS AND SURGEONS.**

Privileged communications — waiver.

*See* EVIDENCE, 1.

**PIERS.**

Right of access to navigable waters includes right to construct pier beyond high-water mark without consent of owner of land under water.

*See* RIPARIAN RIGHTS, 1, 2.

**PLEADING.**

*Employers' Liability Act (L. 1902, Ch. 600).* It is not necessary, in order to plead a cause of action under the Employers' Liability Act (L. 1902, ch. 600), that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with. *Harris v. Baltimore M. & Elev. Works.* 141

In action to foreclose railroad mortgage.

*See* MORTGAGE, 1.

**PLEDGE.**

*See* *Brown v. N. Y. Cab Co. (Mem.), 633.*

**POLICE.**

*See People ex rel. Gleitsman v. Lewis* (Mem.), 543.

**PRACTICE.**

*See Coudert v. Jarrois* (Mem.), 584.

Extra allowance — when improper.

*See COSTS*, 2.

Submission of controversy — question of fact cannot be determined.

*See JURISDICTION*, 1, 2.

**PREMIUMS.**

On policy of fire insurance — when credit given to insured by agent regarded as payment to company.

*See INSURANCE*, 1.

**PRINCIPAL AND SURETY.**

*See Neidlinger v. Stokes* (Mem.), 572; *Sloan v. Nat. Surety Co.* (Mem.), 596.

**PUBLICATIONS.**

When indecent.

*See CRIMES*, 5.

**QUO WARRANTO.**

*See People v. McClellan* (Mem.), 618.

**RAILROADS.**

*See Matter of Brooklyn Union El. R. R. Co.* (Mem.), 558.

Injury to child at railroad crossing — speed of train — damages.

*See NEGLIGENCE*, 2-7.

Contributory negligence in attempting to cross tracks.

*See NEGLIGENCE*, 10.

Owner of premises injured by change of grade in street to abolish grade crossing must file notice of claim for damages with board of railroad commissioners.

*See STREETS.*

**RATIFICATION.**

Of contract by infant.

*See CONTRACT.*

**REAL PROPERTY.**

1. *Judicial Sale* *hereof — Unless Title Is Marketable Bidder Is Not Required to Complete Purchase.* A person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid. *Wanson v. De Nye*.  
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2. *When Motion to Compel Bidder to Complete Purchase May Be Made — Claim of Defective Title — Affidavits.* The fact that a person bids upon property at a judicial sale and signs the terms of sale by which he agrees to complete his purchase at a specified time is sufficient on which to move for an order compelling the purchaser to perform his agreement. If answering affidavits are read alleging, and claiming to show, that the title is defective the Special Term may allow the production of such

**REAL PROPERTY**—*Continued.*

further affidavits, by either party, relating to the title as may be necessary or desirable to bring to the attention of the court the true facts in regard thereto. *Id.*

3. *When Order Directing Bidder to Complete Purchase May Be Reversed and Reference to Take Proof Ordered.* Where the affidavits, constituting the record upon which an order was granted requiring a bidder at a judicial sale to complete his purchase, are very general and in part upon information and belief, so that, after a full consideration of all the facts alleged, an ordinarily prudent person would be justified in hesitating about accepting title to the property or loaning money thereon, the order should be reversed and the case remitted to the Special Term to take further proofs and for a rehearing thereon. *Id.*

4. *When Conveyance of Lot Fronting on Boulevard Running Along and Extending to the Waters of a Navigable River Conveys Title to Roadbed and Appurtenant Riparian Rights.* Where the owner of an island in a navigable river, which had been laid out into lots, with boulevards, streets and roads, according to a map upon which the lots were designated by numbers, sold a lot abutting upon a boulevard running along and extending to the waters of the river, the lot being conveyed as "lot numbered 34 as laid out on the map," with a description so indefinite and ambiguous that reference must be made to the map to ascertain the dimensions and boundaries of the lot, and the deed contains no language from which it can be inferred that the grantor intended to reserve any interest in the fee of the boulevard itself or in the appurtenant riparian rights, the legal title to the whole of the boulevard in front of the lot in question, together with the riparian rights, passed to the grantee of the lot, subject only to the public easement or right of passage over the boulevard. *Johnson v. Grenell.* 407

5. *Warranty Deed—Action upon Covenants Thereof to Recover Amount of Dower and Costs Paid in Action for Dower Defended by Grantee—What Grantee May Recover.* Where it was determined in an action to enforce a widow's right of dower in premises, held by a grantee under a deed containing covenants of warranty and quiet enjoyment, that the widow was entitled to dower as claimed, and that her claim could not be properly satisfied by setting off to her any part of the premises, and, the widow having filed a consent to take a gross sum in lieu of dower, a judgment was entered directing a sale of the property in accordance with the statute (Code Civ. Pro. §§ 16, 17, etc.), the sale under such judgment did not operate as an absolute and total eviction of the grantee from the entire premises; it was simply a method of procedure by which there was a substitution of the proceeds of the land in the place of the land itself, actual partition thereof being impracticable, so that the proceeds could be divided between the widow and the grantee, according to their respective interests, after the value of the widow's right of dower therein had been ascertained; the grantee of such premises cannot recover, therefore, in an action brought against his grantor upon the covenants in his deed, the entire purchase price paid for the premises, together with his costs and disbursements incurred in defending the action for dower. Where, however, notice was given to the grantor to defend in the dower action, and upon his failure so to do the grantee defended in good faith, the latter may recover the amount paid to the widow for her right of dower and the costs and disbursements allowed and paid to her in the action for dower, also his own costs and disbursements in defending such action and the referee's fees and expenses therein, together with interest on each item from the date of sale, except the item of his own costs and expenses, and upon that from the date of judgment in the action for dower. *Olmstead v. Rawson.* 517

6. *Deed—Easement of Way.* Where premises situated on a certain opened street are described in a conveyance thereof as being part of a cer-

**REAL PROPERTY — *Continued.***

tain lot on a certain map, which map shows the lot as bounded by the street in question, there is a sufficient recognition of the map to invest the purchaser with an easement of way through the street as shown, even though no street is mentioned in the conveyance. *Mutter of Mayor, etc., of New York* (Mem.), 581

*See Thyson v. Thyson* (Mem.), 544; *Kent v. Shepard* (Mem.) 566; *Seitz v. Messerschmitt* (Mem.), 587; *Rafferty v. Anderson* (Mem.), 597.

Equitable conversion effected by codicil to will.

*See DECEDENT'S ESTATE*, 4.

Question of fact as to, cannot be determined in submitted controversy.

*See JURISDICTION*, 1, 2.

Summary proceedings — dispossession for non-payment of taxes and rent — costs.

*See LANDLORD AND TENANT.*

When owner of lots abutting on part of street closed by city has no cause of action for damages to her easement of right of access.

*See NEW YORK (CITY OF)*, 3, 4.

When lands owned by firm dealing in real estate deemed to be converted into personality by partnership agreement — effect of exchange of deeds between partners.

*See PARTNERSHIP*, 1-3.

Right of access to navigable water includes right to construct pier beyond high-water mark without consent of owner of land under water.

*See RIPARIAN RIGHTS*, 1, 2.

Injury by change of grade of street to abolish railroad crossing — notice of claim for damages must be filed with board of railroad commissioners.

*See STREETS.*

When equitable conversion of testator's realty into personality is not created by terms of will or by implication.

*See WILL*, 2.

When legacy chargeable upon real estate acquired after execution of will.

*See WILL*, 3, 4.

Suspension of power of alienation of.

*See WILL*, 6.

**RESCISSON.**

*See Peabody v. Anthony & Scoville Co.* (Mem.), 592; *Boas v. Coolbaugh*, (Mem.), 609.

**REVISED STATUTES.**

1 R. S. 772, § 5. — *Usury — Validity of Mortgage Dependent upon Place of Principal Transaction.* The meaning and intent of the Usury Law (1 R. S. 772, § 5, amd. L. 1837, ch. 430) is that the validity of a mortgage is determined by the validity of the agreement of the parties, and such agreement is governed by the law of the place where it is made. *Manhattan L. Ins. Co. v. Johnson*. 108

**RIOT.**

When destruction of building by crowd does not constitute riot.

*See MUNICIPAL CORPORATIONS*, 5.

**RIPARIAN RIGHTS.**

1. *Common-law Rule as to Right of Access Inapplicable — Right of Access Includes Right to Construct Pier Beyond High-water Mark Without Consent of Owner of Land under Water.* A riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the state legislature may prescribe for the protection of the rights of the public, although under the common law of England such structure is regarded as a purpresture or an unlawful encroachment upon the rights of the sovereign, and subject to removal at his pleasure. The fact that in the absence of statutory enactment the courts of this state are ordinarily bound by the rules of the common law does not compel them to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances, and which are inconsistent with what a just consideration of those circumstances demand. Where no vested rights are actually concerned, the application of common-law rules depends upon the extent to which they are reasonable and in accord with public policy and sentiment; and in a state like this, with its numerous large navigable bodies of water, in bays, rivers and inland lakes, and where so many riparian owners have made their easement or right of access practical and available by the construction of docks, piers or wharves, and have done so without interference by the state when superior public rights have not been obstructed, such a rule would be without justification and will not, therefore, be established by the courts. *Town of Brookhaven v. Smith.* 74

2. *Same — Great South Bay — Town of Brookhaven.* An owner of upland adjoining Great South Bay has the right of access to the waters thereof from the front of his lot, and such right includes the construction of a pier on the land under water beyond high-water mark, for his own use or the use of the public, without the consent of the town of Brookhaven, which acquired the title in fee to such land under royal grant in 1666, 1686 and 1693, although at that time under the common law of England riparian owners had no such right, and such structure, in the absence of a license therefor, was a purpresture and subject to removal at pleasure. *Id.*

*See Smith v. Village of Fort Plain (Mem.), 609.*

When conveyance of lot fronting on road extending to waters of a navigable river conveys title to appurtenant riparian rights.

*See REAL PROPERTY, 4.*

**SALE.**

Conditional — when retaining possession of goods delivered under, does not constitute crime.

*See CRIMES, 3.*

Judicial sale of real property — unless title is marketable bidder is not required to complete purchase.

*See REAL PROPERTY, 1-3.*

Conditional — oral contract — when failure to demand property is fatal to action of conversion against purchaser of property sold by vendee in possession under conditional sale.

*See VENDOR AND VENDEE, 1-3.*

**SERVICES.**

*See Harding v. Roman Catholic Church (Mem.), 681.*

Action for — self-serving declarations.

*See EVIDENCE, 6.*

**SESSION LAWS.**

1. 1837, Ch. 430 — *Usury — Validity of Mortgage Dependent upon Place of Principal Transaction.* The meaning and intent of the Usury Law (1 R. S. 772, § 5, amd. L. 1837, ch. 430) is that the validity of a mortgage is determined by the validity of the agreement of the parties, and such agreement is governed by the law of the place where it is made. *Manhattan Life Ins. Co. v. Johnson.* 108

1881, Ch. 483. See par. 2, this title.

1888, Ch. 113. See par. 3, this title.

1884, Ch. 281. See par. 3, this title.

2. 1885, Ch. 439 — *Municipal Corporations — New York Electric Lines Company Not Entitled to Build Independent Subways in City of New York.* The principal, fundamental and essential purpose of the incorporation of the New York Electric Lines Company is to construct, use and maintain lines of wire for conducting electricity. The conduits in which the wires are to be laid are mere incidents to such purpose. The acts of 1885 and 1887 (L. 1885, ch. 439; L. 1887, ch. 716), relating to the placing of electrical conductors under ground in cities of this state, are proper police regulations which the legislature had the power to enact and impair no contract right of the New York Electric Lines Company, although such company, by chapter 488 of the Laws of 1881, was entitled to lay electric conductors under ground in the streets of cities upon securing permission from the common council of the city, and had secured such permission; having failed to take advantage thereof before the passage of such acts, it must comply with their provisions and with the plans adopted thereunder for the purpose of placing electrical conductors under ground. It was the duty of the commissioner of water supply, gas and electricity, therefore, to deny an application of said company for permission to open the streets of the city to construct an independent line of subways or conduits for the purpose of laying electric conductors therein. *People ex rel. N. Y. El. Lines Co. v. Ellison.* 528

1887, Ch. 716. See par. 2, this title.

3. 1890, Ch. 565 — *Railroad Law — Streets — Change in Grade to Abolish Railroad Crossing — Owner of Premises Injured Thereby Must File Notice of Claim for Damages with Board of Railroad Commissioners Within Six Months After Completion of Work.* Where the grade of a village street has been changed pursuant to an order of the board of railroad commissioners for the purpose of abolishing a grade crossing, under the provisions of the Railroad Law (L. 1890, ch. 565, § 62, as amd.), an abutting property owner, whose premises have been injured by such change of grade, cannot recover damages therefor where he has failed to file a notice of claim for such damages with the board of railroad commissioners, within six months after the completion of the work, in compliance with section 65 of the Railroad Law (L. 1890, ch. 565, § 65, as amd. by L. 1900, ch. 517), notwithstanding a notice of such claim was filed with the clerk of the village, within sixty days after the completion of the work, in conformity with the statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894, ch. 172), providing when damages caused by a change in the grade of a street in an incorporated village shall be paid by the municipality, since the latter statute must be read in connection with the sections of the Railroad Law by which the change of grade in question was expressly authorized and under which the damages must be paid by the railroad company, the municipality and the state in certain proportions after an adjustment, by the board of railroad commissioners, of all the claims paid or presented within six months after the completion of the work. *Mutter of Melenbacker v. Vil. of Salamanca.* 370

4. 1890, Ch. 566 — *Transportation Corporations Law — Gas and Electricity — Reasonableness of Price Fixed by Statute — New York City.* Where the price of a commodity is established by law (in this case illu-

**SESSION LAWS—Continued.**

minating gas furnished to the city of New York in the borough of Brooklyn), whatever price the legislature permits to be charged must be deemed to be reasonable, and when the seller makes a charge of less than the maximum, the purchaser cannot resist payment upon the ground that the statute has permitted an unreasonable charge. *Brooklyn Union Gas Co. v. City of New York.* 334

5. 1892, Ch. 685 — *Municipal Law — When Destruction of Building by Crowd Does Not Constitute Riot and Render City Liable for Damages under General Municipal Law.* The destruction of an unoccupied frame building by a varying crowd of young men and boys numbering from eight to thirty, there being no evidence of any purpose to accomplish the destruction by violence and in spite of any resistance, but on the contrary, it appearing that when a policeman approached, the crowd ran away, does not constitute the offenders guilty of riot within the meaning of section 449 of the Penal Code, so as to entitle the owner to recover from a municipality the value of the building under section 21 of the General Municipal Law (L. 1892, ch. 685), providing that a city or county shall be liable to a person whose property is destroyed or injured therein by a mob or riot for the damages sustained thereby. *Adamson v. City of New York.* 255

6. 1898, Ch. 701 — *Will — Gift to Trustees for Charitable Purposes — When the Trustees, Not the Supreme Court, Are Charged With the Duty of Executing the Trust.* Where a testator gave his residuary estate to his executors, as trustees, to pay the income thereof to his widow during her life, and after her death he gave a number of specific legacies from the residuary estate, and then gave the remainder thereof to designated persons, requesting them to apply such fund to the creation of a charitable or educational institution, or, if that should not be expedient, to the enlargement of the endowment of an existing charitable institution, the disposition of the fund within the limits indicated being intrusted to the judgment and discretion of such persons, the title to such residuary estate is vested in them as trustees and joint tenants under the statute regulating gifts for charitable purposes (L. 1898, ch. 701), and so long as any of them survive, they, and not the Supreme Court, are invested with the power, and charged with the duty, of executing the trust. *Rothschild v. Schiff.* 327

1894, Ch. 172. See par. 3, this title.

7. 1896, Ch. 547 — *Real Property Law — Will — When Provision Suspending Division of Residuary Estate During the Minority of "Youngest Child" Not in Contravention of Statute Forbidding Suspension of Power of Alienation.* A provision in a will that the property shall be divided among the residuary legatees “after the youngest child of them shall have attained the age of twenty-one years,” and that, “until such time and during his minority,” the widow shall have the use and income of the estate, does not render the will void (1) because it suspends the power of alienation during a fixed period not measured by lives, and (2) because the same power is suspended during the existence of more than two lives in being; there is nothing in the will to indicate that it was testator's intention to suspend the power of alienation for a fixed period of time; on the contrary, the term used, when given its usual legal meaning, imports simply a suspension during a “minority,” and that expression, as defined by the statute (Real Prop. Law [L. 1896, ch. 547], § 32), is deemed to signify “a part of a life and not an absolute term equal to the possible duration of such minority;” and the direction that the testator's property “be equally divided and equally shared” among his wife and children, “after the youngest child of them shall have attained the age of twenty-one years,” must be construed as of the time of the testator's death, and so construed it plainly refers to the youngest of his children then living, who was in fact his youngest child, and a suspension of the power of alienation during his minority is valid. *Jacoby v. Jacoby.* 124

**SESSION LAWS — Continued.**

8. *Idem — Partnership — Conversion of Real Property.* A partnership for dealing in real estate may be created by parol and the question whether the interest of a partner in such real estate shall for purposes of distribution be treated as realty or personalty is incidental to the relation of copartnership. Its disposition is governed by the agreement, express or implied from the acts of the copartners, and the finding of an intention for a conversion does not conflict either with the spirit or the letter of the statute (Real Property Law [L. 1896, ch. 547], § 207), which provides that "An estate or interest in real property, \* \* \* or any trust or power over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same." *Buckley v. Doig.* 238

9. *Idem — When, and How, Trustees May Dispose of Trust Fund Before Death of Life Tenant — Erroneous and Unauthorized Direction by Supreme Court.* A finding by the referee, in an action brought for the construction of a will, that it would be inadvisable to establish an independent institution with the residuary fund and that a majority of the trustees have decided that the fund should be given to a certain educational institution, does not warrant a direction by the Supreme Court that, upon the death of the life tenant, but not until then, the fund should be used for the benefit of such institution; the action of the trustees did not constitute an execution of the trust nor operate to transfer the property of the trust or determine the disposition thereof; the trustees, as such and as joint tenants, must join in the execution of some written instrument sufficient to convey the real, as well as the personal property of which the trust is composed; while the trustees take the property of the trust as remaindermen, subject to the life estate of testator's widow, they have the power to dispose of their interest therein and execute the trust during the lifetime of the life tenant (Real Property Law; L. 1896, ch. 547, § 49); whether they ought, or ought not, to do so, before the death of the life tenant, must be determined by the united judgment and discretion of the trustees, themselves, and no duty now devolves upon the Supreme Court to direct them to act at any particular time; if they should fail to execute the trust and the estate become vested in the Supreme Court, the court may then assume jurisdiction and carry out the trust; until that time, however, it has no jurisdiction to direct any disposition of the fund. *Rothschild v. Schiff.* 327

10. 1896, Ch. 908 — *Tax Law — Tax Imposed upon Bank Stock — Assessed Value of Stock of Bank Located in Tax District Must Be Included in Aggregate Amount of Taxable Property of Such District for Purpose of Fixing Amount of General Tax to Be Levied on District.* Under the provisions of the Tax Law (L. 1896, ch. 908, § 24, as amd. by L. 1901, ch. 550; L. 1902, ch. 126, and L. 1903, ch. 237), "the rate of tax upon the shares of stock of banks and banking associations shall be one percentum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided," which "tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock," and which tax shall be collected by the board of supervisors of the county in which the bank or association is located, and be distributed by them among the tax districts of the county, including the district in which the bank is located, according to a rate to be ascertained in a manner prescribed in the statute; but there is no provision which authorizes or justifies the omission from the aggregate assessed valuation of a tax district for the purpose of fixing the amount of state and county taxes to be paid thereby, of the assessed value of the stock of such bank, which would be inequitable; and where there are two banks within a small city, which constitutes a tax district of a county, the same as a town, the assessed value of the stock of such banks must

**SESSION LAWS — Continued.**

18. 1901, Ch. 466 — *New York Charter — When City May Close Public Streets — Powers of Board of Estimate and Apportionment.* Under the Greater New York charter (L. 1901, ch. 466, § 442, as amd. by L. 1903, ch. 409) and upon compliance with the steps therein prescribed, the board of estimate and apportionment has the power with the approval of the mayor, to change the map or plan of the city by closing an existing street; under such provisions it may close a street, never actually opened or used as a public street, although laid out as a proposed street upon an official map of streets and avenues proposed to be opened as public streets and avenues of a certain township, by commissioners appointed pursuant to law, which map, by force of the annexation and consolidation acts, became a part of the map of the greater city of New York, where, after the consolidation and in pursuance of a resolution of the board of estimate and apportionment, proceedings were instituted to open the street, and thereafter the board by a resolution, adopted in conformity with section 990 of the charter, directed that the title to the property required for the street should be vested in the city of New York. *Reis v. City of New York.* 58

19. *Idem — Same — When Proceeding to Close Public Street Need Not Originate in Local Board of District in Which Street Is Situated — Construction of Sections 428, 432, 438 and 434 of New York Charter.* The closing of such street by the board of estimate and apportionment with the approval of the mayor is not irregular and invalid because the proceeding did not originate with the local board of the district in which the street is located, as required by the provisions of the charter (L. 1901, ch. 466, §§ 428, 432, 433 and 434) relating to proceedings "to open, close \* \* \* and repair the streets, avenues and public places \* \* \* within the district;" the legislature intended, by these provisions, to confer upon the local boards the authority to deal in the first instance with applications for local improvements made to them *by petition*, but meant to commit to the jurisdiction of the board of estimate and apportionment, with the co-operation of the chief executive of the city, the power of its own volition to initiate and carry through such public improvements as they should deem for the best interests of the city at large, irrespective of any action or lack of action by the subordinate local boards. *Id.*

20. *Idem — When Owner of Lots Abutting on Part of Street Closed by City of New York, Under Section 442 of the Charter, Has No Cause of Action for Damages to Her Public Easement of Right of Access.* Where the city of New York, owning all the lots abutting on a certain street, between two streets running at right angles thereto, together with all the right, title and interest which its grantors had in such street, has closed the street, under and in compliance with the provisions of the charter relating thereto (L. 1901, ch. 466, § 442, as amd. by L. 1903, ch. 409), between the intersecting streets, and erected a building thereon for hospital purposes, the owner of lots abutting on the same street, but in the two next adjacent blocks, facing on the street, has suffered and can suffer no actionable damage, so far as any of her public easements are concerned, by the closing of the street, when it is not intended to close any part of the street upon which any of her property abuts, or any part thereof which is opposite a block in which she owns property, and the closing and discontinuance of the street will still leave all of her lots accessible by public ways. *Id.*

21. *Idem — New York (City of) — Civil Service Law — When Clerk Removed from Position in Office of Coroner of Borough of Richmond Entitled to Mandamus Directing His Reinstatement.* Where a member of a disbanded volunteer fire department in the county of Richmond was appointed as a clerk in the office of the coroner of the borough of Richmond under the authority of section 1571 of the Greater New York charter, which provides that "The coroners in each borough shall have an office in

**SESSION LAWS — *Continued.***

said borough and shall appoint a clerk who shall receive an annual salary to be fixed by the board of estimate and apportionment and the board of aldermen, and such and so many assistant clerks as shall be provided for in the annual budget. They shall also appoint a stenographer in each borough," etc., such clerk was not appointed to and did not hold a public office, but held a clerical and subordinate position without original, independent or governmental duties, and having been removed and dismissed from such position without any hearing whatever, as required by the Civil Service Law (L. 1899, ch. 370, § 21, as amd. by L. 1904, ch. 697), he is entitled, in the absence of evidence that he held "the position of private secretary, cashier or deputy of any official or department," which positions are excepted from the requirements of the latter statute, to a peremptory writ of mandamus requiring the coroner of the borough of Richmond to reinstate him in the position from which he was removed and he is not compelled to resort to an action of quo warranto. *People ex rel. Hoeple v. Cahill.* 489

1901, Ch. 550. See par. 10, this title.

1902, Ch. 126. See par. 10, this title.

22. 1902, Ch. 600 — *Employers' Liability Act — Pleading.* It is not necessary, in order to plead a cause of action under the Employers' Liability Act (L. 1902, ch. 600), that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with. *Harris v. Baltimore M. & El. Works.* 141

23. *Idem — Same — Negligence — Action by Servant to Recover for Injuries Caused by Negligence of Employer's Superintendent — Sufficiency of Allegations of Complaint.* Where, in an action brought by an employee of a foreign corporation to recover for injuries sustained by him by reason of the fall of a defective and unsafe elevator, constructed by and then being operated under the supervision and control of the defendant, which the plaintiff had entered in obedience to orders of the defendant's superintendent, the complaint states all the facts necessary to be proved to establish that the negligence which occasioned the happening of the accident was that of defendant's superintendent and then alleges that "within 120 days after the occurrence of said accident \* \* \* and on the 18th day of March, 1903, due notice in writing of the time, place and cause of the injury was given in the manner provided by and pursuant to chapter 600 of the Laws of 1902," such complaint states facts sufficient to constitute a cause of action under the Employers' Liability Act. *Id.*

1903, Ch. 267. See par. 10, this title.

1903, Ch. 409. See pars. 18, 19 and 20, this title.

1904, Ch. 697. See par. 21, this title.

24. 1906, Ch. 481 — *Apportionment Act Wholly Invalid.* The violation of the constitutional provisions in the formation of the second and thirteenth senatorial districts so affects the entire Apportionment Act (L. 1906, ch. 481) as to render it wholly unconstitutional and void. *Matter of Sherrill v. O'Brien.* 185

**SIGNBOARDS.**

Liability of bill posting company for injuries caused by fall of signboard.

*See NEGLIGENCE,* 15.

**SPECIAL GUARDIANS.**

*See Matter of Stevens (Mem.), 589.*

**SPECIFIC PERFORMANCE.**

Of contract for purchase of real estate by municipality.

*See CONTRACT*, 3.

**STATE.**

Invalid apportionment of senatorial districts.

*See CONSTITUTIONAL LAW*, 1-9.

**STOCKHOLDERS.**

*See Gause v. Boldt* (Mem.), 546; *Persons v. Gardner* (Mem.), 571.

**STOCKS.**

Dividends, cash or stock representing profits and not capital go to life beneficiary — stockholders have no right in profits until declaration of dividend — proceeds of subscription rights go to remaindermen.

*See TRUSTS*, 1, 2.

**STREETS.**

*Change in Grade to Abolish Railroad Crossing — Owner of Premises Injured Thereby Must File Notice of Claim for Damages with Board of Railroad Commissioners Within Six Months After Completion of Work.* Where the grade of a village street has been changed pursuant to an order of the board of railroad commissioners for the purpose of abolishing a grade crossing, under the provisions of the Railroad Law (L. 1890, ch. 565, § 62, as amd.), an abutting property owner, whose premises have been injured by such change of grade, cannot recover damages therefor where he has failed to file a notice of claim for such damages with the board of railroad commissioners, within six months after the completion of the work, in compliance with section 65 of the Railroad Law (L. 1890, ch. 565, § 65, as amd. by L. 1900, ch. 517), notwithstanding a notice of such claim was filed with the clerk of the village, within sixty days after the completion of the work, in conformity with the statute (L. 1883, ch. 113, as amd. by L. 1884, ch. 281, and L. 1894, ch. 172), providing when damages caused by a change in the grade of a street in an incorporated village shall be paid by the municipality, since the latter statute must be read in connection with the sections of the Railroad Law by which the change of grade in question was expressly authorized and under which the damages must be paid by the railroad company, the municipality and the state in certain proportions after an adjustment, by the board of railroad commissioners, of all the claims paid or presented within six months after the completion of the work. *Matter of Melenbacker v. Vil. of Salamanca*. 370

*See Koenen v. City of Mount Vernon* (Mem.), 607; *Rogers v. Village of Attica* (Mem.), 625.

Duty of city to keep free from dangerous defects — use of automobiles upon city streets.

*See MUNICIPAL CORPORATIONS*, 1-4.

Closing of, in New York city.

*See NEW YORK (CITY OF)*, 1-4.

When electrical company not entitled to build subways in New York city streets.

*See NEW YORK (CITY OF)*, 8.

**SUBWAYS.**

In New York city — when electrical company not entitled to build.

*See NEW YORK (CITY OF)*, 8.

**SUMMARY PROCEEDINGS.**

Dispossession for non-payment of taxes and rent.

*See LANDLORD AND TENANT.*

**SUPERVISORS.**

*See Matter of Smith v. Cook (Mem.), 549.*

**SUPREME COURT.**

Jurisdiction of, to correct erroneous disposition of void and protested ballots — has no power to order re-canvass of ballots.

*See ELECTIONS, 1, 2.*

**SURRENDER.**

Of policy of fire insurance.

*See INSURANCE, 2.*

**SYRACUSE (CITY OF).**

Conditional contract to purchase real estate — when cannot be specifically enforced.

*See CONTRACT, 3.*

**TAX.**

1. *Tax Imposed upon Bank Stock under Section 24 of the Tax Law — Assessed Value of Stock of Bank Located in Tax District Must Be Included in Aggregate Amount of Taxable Property of Such District for Purpose of Fixing Amount of General Tax to be Levied on District.* Under the provisions of the Tax Law (L. 1898, ch. 908, § 24, as amd. by L. 1901 ch. 550; L. 1902, ch. 126, and L. 1903, ch. 267), "the rate of tax upon the shares of stock of banks and banking associations shall be one per centum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided," which "tax shall be in lieu of all other taxes whatsoever for state, county or local purposes upon the said shares of stock," and which tax shall be collected by the board of supervisors of the county in which the bank or association is located, and be distributed by them among the tax districts of the county, including the district in which the bank is located, according to a rate to be ascertained in a manner prescribed in the statute; but there is no provision which authorizes or justifies the omission from the aggregate assessed valuation of a tax district for the purpose of fixing the amount of state and county taxes to be paid thereby, of the assessed value of the stock of such bank, which would be inequitable; and where there are two banks within a small city, which constitutes a tax district of a county, the same as a town, the assessed value of the stock of such banks must be included in the aggregate amount of taxable property of the city for the purpose of fixing the amount of taxes to be levied upon the city by the board of supervisors. *People ex rel. City of Geneva v. Bd. of Suprs. Ont. Co.* 1

2. *Tax upon Bank Stocks, Although in Lieu of All Other Taxes, Is Not Exclusively for Benefit of Tax District Wherein Bank Is Located.* The tax upon bank stocks under section 24 of the Tax Law is not raised for local purposes and divided amongst the local tax districts for village or city, town or school purposes only; it is in lieu of all other taxes, expressly including state and county taxes, and there is no more reason for saying that it is exclusively raised on account of local purposes or interest than that it is raised exclusively on account of state and county purposes. *Id.*

3. *Tax upon Bank Stock Is Not in the Nature of a License, but a Tax upon Property.* The contention that the tax imposed upon the stock of banks and banking associations under section 24 of the Tax Law is in the nature of a license for conducting the banking business and, therefore, like the license fees collected under the Liquor Tax Law, ought to be appropriated exclusively to the use and benefit of the district in which the bank is located, is untenable. The Liquor Tax Law plainly and explicitly imposes certain license fees upon the business of trafficking in liquor and provides for a distribution of the license fees thus collected. The Tax Law imposes a tax upon bank stock as property just as it does upon other species of property, and there is nothing in the nature of a license fee about it. *Id.*

**TAX—Continued.**

4. *Transfer Tax—When Property Passing under an Ante-nuptial Contract, Whereby a Decedent Agreed to Make a Will in Favor of the Beneficiary Named Therein Is Subject to Tax.* Where it has been adjudicated by the Supreme Court, in an action brought by the stepdaughter of a testator against his executors and trustees and the beneficiaries named in his will, that she was entitled to all of the real and personal property of testator, under an ante-nuptial agreement between him and her mother whereby he agreed to devise and bequeath all of his property to such stepdaughter, if no children should be born of his marriage with her mother, and the judgment directed the defendants to execute and deliver to the plaintiff all necessary releases and conveyances of such property, the property passing to testator's stepdaughter under such judgment is not exempt from taxation under the Transfer Tax Act (L. 1896, ch. 908, art. 10), since the contract, enforced by such judgment and under which testator's stepdaughter receives the property, was not a contract to convey the property, but a contract to make a will in her favor and even if the testator had performed his agreement and given her his property by his will, the estate would have been subject to the tax. *Matter of Kidd.* 274

5. *Same—Liability of Property to Transfer Tax Not Affected by Resort to the Courts to Enforce the Contract.* The fact that testator's stepdaughter, in consequence of the failure of testator to carry out his agreement, was obliged to resort to the courts for relief, does not affect the question of liability of the estate to the transfer tax; the judgment did not set aside the will, but enforced the ante-nuptial contract and converted the devisees under the will or the heirs at law or next of kin of testator, as the case may require, into trustees for the beneficiary under the agreement, so that the devolution of testator's property has, in fact, taken place under the will and is subject to the transfer tax. *Id.*

*See People ex rel. Travelers' Ins. Co. v. Kelsey* (Mem.), 541; *People ex rel. Conn. Mut. Life Ins. Co. v. Kelsey* (Mem.) 541; *People ex rel. Hyde & Sons v. O'Donnell* (Mem.), 551; *People ex rel. International Banking Co. v. Raymond* (Mem.), 551.

**TITLE.**

Unless marketable, bidder at judicial sale is not required to complete purchase.

*See REAL PROPERTY, 1-3.*

When conveyance of lot fronting on road extending to waters of navigable river conveys title to roadbed and appurtenant riparian rights.

*See REAL PROPERTY, 4.*

**TRADE MARKS.**

*See Barrett Chemical Co. v. Stern* (Mem.), 576; *Cushman & D. Mfg. Co. v. Clipper Mfg. Co.* (Mem.), 621.

**TRANSFER TAX.**

*See Matter of Bishop* (Mem.), 635.

When property passing under an ante-nuptial contract, whereby a decedent agreed to make a will in favor of the beneficiary named therein is subject to tax.

*See TAX, 4, 5.*

**TRESPASS.**

*See Bunks v. N. Y. Telephone Co.* (Mem.), 600; *Finucan v. Ramoden* (Mem.), 608.

**TRIAL.**

For murder — sufficiency of evidence.

*See CRIMES, 1, 2.*

**TRIAL** — *Continued.*

Elements of damages in actions for personal injuries — when loss of income may be shown — erroneous admission of evidence tending to show loss of profits.

*See* DAMAGES, 1, 2.

Waiver of provisions of section 884 of the Code of Civil Procedure prohibiting disclosure by physician of secrets of a patient.

*See* EVIDENCE, 1.

When admissions contained in a counterclaim are admissible in evidence against the defendants in an action — when interest of witness in result of action too remote to disqualify him from testifying as to conversation with a deceased defendant.

*See* EVIDENCE, 2, 3.

When evidence, tending to show that a defendant had sufficient moneys to make payments alleged, is admissible to prove payment.

*See* EVIDENCE, 4.

When defendant may prove, under a general denial, facts tending to show that final payment is not due upon building and loan contract.

*See* EVIDENCE, 5.

When negligence of parents in permitting child to cross railroad tracks unattended properly submitted to jury — when speed of trains at crossing properly submitted to jury.

*See* NEGLIGENCE, 5, 6.

**TRUSTS.**

1. *Dividends, Cash or Stock, Representing Profits and Not Capital, Go to Life Beneficiary.* Where a testamentary trust of specific securities is created, with a direction that "the income and profits thereof" be paid to a beneficiary for life, with a bequest over of such securities at the termination of the life estate, extraordinary distributions or dividends, representing accumulated income and profits and not capital, go to the life tenant; and in determining this question the terms used by the corporation in declaring the distribution, as in this case from its "cash surplus," or its methods of bookkeeping are not conclusive; if an examination of the facts establishes that the amount distributed does not trench upon the capital, but was from a surplus of corporate earnings and income, unaffected by proceeds of sales of real estate forming a part of the company's capital, the life tenant is entitled thereto. *Robertson v. de Brulatour.* 801

2. *Stockholders Have No Right to Profits until Declaration of Dividend.* The earnings of a corporation remain its property until a division is made or a dividend declared. Until that time whatever interest a stockholder has therein passes with a transfer of his stock as an incident thereto. Where, therefore, such stock becomes a part of the *corpus* of the trust, dividends thereafter declared are like all other income of the trust fund and belong to the life tenant. Various transactions in testator's lifetime, claimed to have created obligations of the corporation to stockholders, examined, and held that such obligations were not created until the distribution of stock and cash was actually declared. *Id.*

3. *Proceeds of Subscription Rights Attached to Trust Securities Go to Remaindermen.* New shares of stock purchased by the trustees in the exercise of the right attached to the trust securities to subscribe therefor, and sums of money received from the sale of such subscription rights, become capital and the life tenant is not entitled thereto. *Id.*

**TRUSTS—Continued.**

**4. When Trustees Not Obliged to Maintain Sinking Fund.** The rule that trustees must maintain a sinking fund, with which to make good any depreciation in the value of the securities by the falling off in premiums, has no application where such securities have been specifically bequeathed. *Id.*

**5. Trustees' Commissions—Code Civ. Pro. § 3320.** Trustees are entitled to commissions for receiving and paying out all sums of principal, including the value of the securities forming a part of the *corpus*. *Id.*

**6. Beneficiary May Act as Trustee.** The life beneficiary may act as trustee with others in the management of the trust, and is entitled to the same commissions as her co-trustees upon the *corpus* of the trust. *Id.*

**7. Gift to Trustees for Charitable Purposes—When the Trustees, Not the Supreme Court, Are Charged With the Duty of Executing the Trust.** Where a testator gave his residuary estate to his executors, as trustees, to pay the income thereof to his widow during her life, and after her death he gave a number of specific legacies from the residuary estate, and then gave the remainder thereof to designated persons, requesting them to apply such fund to the creation of a charitable or educational institution, or, if that should not be expedient, to the enlargement of the endowment of an existing charitable institution, the disposition of the fund within the limits indicated being intrusted to the judgment and discretion of such persons, the title to such residuary estate is vested in them as trustees and joint tenants under the statute regulating gifts for charitable purposes (L. 1898, ch. 701), and so long as any of them survive, they, and not the Supreme Court, are invested with the power, and charged with the duty of executing the trust. *Rothschild v. Schiff.* 327

**8. When, and How, Trustees May Dispose of Trust Fund Before Death of Life Tenant—Erroneous and Unauthorized Direction by Supreme Court.** A finding by the referee, in an action brought for the construction of such will, that it would be inadvisable to establish an independent institution with the residuary fund and that a majority of the trustees have decided that the fund should be given to a certain educational institution, does not warrant a direction by the Supreme Court that, upon the death of the life tenant, but not until then, the fund should be used for the benefit of such institution; the action of the trustees did not constitute an execution of the trust nor operate to transfer the property of the trust or determine the disposition thereof; the trustees, as such and as joint tenants, must join in the execution of some written instrument sufficient to convey the real, as well as the personal property of which the trust is composed; while the trustees take the property of the trust as remaindermen, subject to the life estate of testator's widow, they have the power to dispose of their interest therein and execute the trust during the lifetime of the life tenant (Real Property Law: L. 1896, ch. 547, § 49); whether they ought or ought not, to do so, before the death of the life tenant, must be determined by the united judgment and discretion of the trustees, themselves, and no duty now devolves upon the Supreme Court to direct them to act at any particular time; if they should fail to execute the trust and the estate become vested in the Supreme Court, the court may then assume jurisdiction and carry out the trust; until that time, however, it has no jurisdiction to direct any disposition of the fund. *Id.*

**9. Evidence—When Testimony as to Statements of Testator Regarding the Purpose of Trust Created by Him Is Competent.** The reception of evidence, upon the trial of an action for the construction of testator's will, as to the conversation and declarations of the testator with reference to institutions that he favored, was not erroneous; the trustees of the residuary estate are to exercise their judgment and discretion in disposing of

**TRUSTS — Continued.**

this estate and in discharging this duty they may, if they so desire, avail themselves of the judgment and desires of the testator. *Id.*

**10. Testamentary Trust — When Gift of Residuary Estate in Trust to Pay Annuity to Widow for Life and Balance of Income to Children During Lives of Two Daughters of Testator Not an Unlawful Suspension of Power of Alienation.** The will of a testator gave his entire estate, real and personal, remaining after the payment of his debts and some general bequests, to his executors in trust, to pay to his wife, from the income thereof, a certain annuity during her life in lieu of dower, and after the payment of "the above annuity or dower interest" to divide the net residue of the income into five equal parts and pay one share thereof to each of his two daughters and three sons, or their issue, until the death of the two daughters; if any of such five children should die before the testator, without issue, the net residuary income to be divided among those surviving or represented by issue; upon the death of the two daughters, the residuary estate was given to the issue of his two daughters, naming each, and to his three sons, naming each, "or to the issue of either of said sons, if they shall have previously died leaving issue." Held, that the trust is measured by the lives of the two daughters, and terminates upon the death of the survivor of them; when the survivor dies the *corpus* of the trust will vest in the residuary legatees, subject to the payment of the annuity to testator's widow, so that if the value of her annuity be computed and paid the lien thereof can be discharged and the residuary estate divided among the legatees entitled thereto at that time. *People's Trust Co. v. Flynn.* 385

**11. Failure to Provide for Disposition of Income and Corpus of Trust in Event of Death of Child Without Issue Before Termination of Trust — Share of Such Deceased Child Must Be Distributed under Statute of Descents and Distribution.** No provision having been made for the disposition of either the income or *corpus* of the trust in the event of the death of one or more, of testator's children, without issue, during the existence of the trust, since the gift was to take effect *in futuro*, when the last of the two daughters died, not *in presenti*, as of the date of the will, and one of testator's sons having died since the death of testator, without issue, during the pendency of the trust, testator died intestate, both as to the income and *corpus* of that part of the trust to which said son, or his issue, would have been entitled; and, therefore, a grandchild, son of a deceased daughter of testator, who was excluded from any participation in the division of the residuary estate, as made by the will, is not excluded from participating in the division of the share of such deceased son, under the Statute of Descents and Distribution. *Id.*

**Passive** — when gift to designated person, in trust for residuary legatees, fails to create a valid active trust.

*See WILL, 5.*

**USURY.**

**1. Validity of Mortgage Dependent upon Place of Principal Transaction.** The meaning and intent of the Usury Law (1 R. S. 772, § 5, amd. L. 1887, ch. 480) is that the validity of a mortgage is determined by the validity of the agreement of the parties, and such agreement is governed by the law of the place where it is made. *Manhattan L. Ins. Co. v. Johnson.* 108.

**2. Mortgage upon Lands in the State Given as Collateral to Promissory Notes Executed in a Foreign State.** A mortgage upon lands in this state, given to secure the payment of promissory notes executed and payable in a foreign state, of which both the parties were residents, although tainted with usury according to the laws of this state, is enforceable, if valid according to the laws of the state where the principal transaction took place. *Id.*

**VENDOR AND VENDEE.**

1. *Conditional Sale—Oral Contract.* Where machinery is sold to a corporation under an oral agreement by which the title was to remain in the vendor until the payment by the vendee of the purchase price, for which drafts were given, the transaction constitutes a conditional sale, although the agreement being oral is not filed as required by statute. *Tompkins v. Fonda Glove Lining Co.* 201

2. *Evidence—When Declarations by Deceased Officer of Corporation against His Interests Are Admissible in Action against the Corporation.* Where the vendee, while in default in the payment of the drafts given for the purchase price of the machinery, transferred it, together with other personal property, to a firm who were large creditors of the vendee, and such firm sold the machinery to a corporation against which the vendors brought an action for the conversion of the machinery, declarations made by a deceased stockholder and director of the defendant who had negotiated the purchase of the machinery for the defendant, are properly admitted to prove that the defendant had knowledge of the plaintiffs' claim of title to the machinery; not because the person making such declarations was an officer of the defendant, but for the reason that the declarant was dead; that he possessed competent knowledge of the facts and that the declarations were at variance with his interests and, therefore, likely to be true. *Id.*

3. *Conversion—Action against Purchasers of Property Sold by Vendee in Possession under Conditional Sale—When Failure to Demand Property Is Fatal to Action of Conversion.* Where it is found by the trial court, upon the trial of such action, "that no sufficient demand for the restoration of the property in question was made before the commencement of this action," such finding, approved by a unanimous decision of the Appellate Division, is fatal to a recovery by the plaintiffs, where it appears that after the default the vendor allowed the machinery to remain in the hands of the vendees, and, therefore, they had an interest which they could sell to the defendant, since it is the general rule that where property comes lawfully into the possession of a party he cannot be charged with conversion in failing to surrender it to the owner unless a demand therefor is made. *Id.*

**WAIVER.**

Of provisions of section 834 of the Code of Civil Procedure prohibiting disclosure by physician of secrets of a patient.

*See EVIDENCE, 1.*

Of requirement of policy of fire insurance.

*See INSURANCE, 2.*

**WARRANTY.**

*See Belden v. Oldsmobile Co. (Mem.), 599; Hogue v. Simonson (Mem.), 637.*

Deed—action upon covenants to recover amount paid by grantee in settlement of action for dower.

*See REAL PROPERTY, 5.*

**WATERS AND WATERCOURSES.**

Right of access to navigable waters includes right to construct pier beyond high-water mark without consent of owner of land under water.

*See RIPARIAN RIGHTS, 1, 2.*

**WHARVES.**

Right of access to navigable waters includes right to construct pier beyond high-water mark without consent of owner of land under water.

*See RIPARIAN RIGHTS, 1, 2.*

**WILL.**

*1. Residuary Legacy—Discretionary Power of Sale—When Absolute Title to Residuary Estate Vests in Residuary Legatees Subject Only to Discretionary Power of Sale Conferred upon Executor.* Where a testator after making several pecuniary bequests, devised and bequeathed all the residue and remainder of his real and personal estate, in equal shares, to five persons named in his will, and then gave and devised all of his real and personal estate to the person named as his executor, in trust, for the payment of his debts and the legacies previously specified, with power to sell and dispose of the same in such manner and at such time or times as he should deem best for the interests of the estate, and directed him to pay the legacies in full in the order named in the will, the title to testator's property vested, upon his death, in the residuary legatees, subject only to the discretionary power of sale conferred upon the executor; and they, alone, are entitled to the rents and profits of lands owned by testator at the time of his death; the executor was not empowered to receive the rents and profits of the estate, nor was the power of sale imperative; he took no estate, but simply a power in trust to sell, discretionary in its exercise, as he might find it advisable to act, for the purpose of paying the debts of testator, if any, and the legacies in full in the order in which they were named. *Coann v. Culver.* 9

*2. When Equitable Conversion of Testator's Realty into Personality Is Not Created by Express Terms of Will or by Implication—When Administrator with Will Annexed May Not Maintain Action for Rents and Profits of Lands Owned by Testator.* Where there is nothing in the will which, in express terms, commands a conversion of testator's real estate into personality as of the date of his death, and where upon the trial of an action, brought by the administrator with the will annexed, to compel a co-tenant of testator to account for and pay over the one-half part of the rents, income and profits received from a farm owned by such co-tenant and testator as tenants in common, no fact appears, or is found, which reveals any such situation at the time when the will was made as to support an implication that the testator intended such a conversion, such action cannot be maintained upon the grounds that the terms of the will had effected an equitable conversion of the testator's real estate into personality and "that the converted fund became personal assets in the hands of the executor," including the rents and profits of the interest in the farm, and went to the plaintiff as administrator with the will annexed. 1.

*3. When Legacy Chargeable upon Real Estate Acquired After Execution of Will.* A will operates from the time of the testator's death, and the real estate owned by him at that time, although acquired after the execution of his will, is chargeable with the payment of legacies that are a lien upon realty, especially where the provision of the will charging the payment of legacies upon his real estate is restated and republished in a codicil thereto, after the acquisition of the real estate not owned at the time of the execution of the will. *Iroin v. Teller.* 25

*4. Construction of Provision for Annuity and Legacy to Be Paid by Residuary Legatee, When Chargeable upon Real Estate.* A testator, who had at the time of the execution of his will no personal property except furniture and other household goods which he bequeathed to his wife absolutely, devised and bequeathed all of his property to his wife for her use and benefit during her life; upon her death he devised certain farms to two of his sons, subject to an annuity to be paid to a third son in his lifetime, and legacies to be paid to the next of kin of such son after his death; the residue and remainder of his property testator devised and bequeathed to his two daughters, subject to the payment by each of them of a certain annuity to his third son, directing each of them to set apart, out of the personal property bequeathed to her, a sum large enough to produce the prescribed annuity and hold the same in trust to pay the annuity from the income thereof, any deficiency to be made up out of her

**WILL — Continued.**

own means, but not to be a charge upon her property, and upon the death of such son to pay over and transfer such annuity fund to his next of kin; testator died possessed of no personal property and none came into the possession of his daughters under the residuary clause of the will, so that they were unable to set apart the annuity trust funds as directed and there never was such a fund in their hands, but they paid, during the lifetime of the brother, the annuity to which he was entitled; the only property which passed to the daughters under the residuary clause was four lots or parcels of land the value of which is not proved, one of which was subject to a mortgage. *Held*, that the two legacies — consisting of the amount of the two trust funds which testator directed his daughters to set apart to produce the annuity for his third son — are chargeable upon the real estate devised to them by the residuary clause of the will; since it is apparent, from the provisions of the will construed in the light of the extrinsic circumstances, that such was the intention of the testator. *Id.*

**5. Passive Trust — When Gift to Designated Person, in Trust for Residuary Legatees, Fails to Create a Valid Active Trust.** Where a testator, by the first clause of his will, gives to his wife all his estate in trust for the residuary legatees, subject to certain specific legacies, and, by the sixth clause of the will, gives all the residue and remainder of his property to his residuary legatees, naming his wife and four of his children as such legatees, directing "the same to be equally divided and equally shared among them after the youngest child of them shall have attained the age of twenty-one years, and until such time and during his minority I desire that my wife shall receive and have the sole use of the rents and income of my estate after payment of any tax or expense incidental to the use and care of said property," no valid trust is created by such provision; the designated trustee is herself one of the residuary legatees, and not a single trust duty or function is imposed upon her; the projected trust is clearly a passive one, which, under section 73 of the Real Property Law, transmits no title to the trustee, and the estate vests, therefore, in the five residuary legatees named in the will, subject to the wife's use during the minority of the youngest child, or until his earlier death. *Jacoby v. Jacoby.* 124

**6. When Provision Suspending Division of Residuary Estate During the Minority of "Youngest Child" Not in Contravention of Statute Forbidding Suspension of Power of Alienation.** The provision that the property shall be divided among the residuary legatees "after the youngest child of them shall have attained the age of twenty-one years," and that, "until such time and during his minority," the widow shall have the use and income of the estate, does not render the will void (1) because it suspends the power of alienation during a fixed period not measured by lives, and (2) because the same power is suspended during the existence of more than two lives in being; there is nothing in the will to indicate that it was testator's intention to suspend the power of alienation for a fixed period of time; on the contrary, the term used, when given its usual legal meaning, imports simply a suspension during a "minority," and that expression, as defined by the statute (Real Prop. Law [L. 1896, ch. 547], § 82), is deemed to signify "a part of a life and not an absolute term equal to the possible duration of such minority;" and the direction that the testator's property "be equally divided and equally shared" among his wife and children, "after the youngest child of them shall have attained the age of twenty-one years," must be construed as of the time of the testator's death, and so construed it plainly refers to the youngest of his children then living, who was in fact his youngest child, and a suspension of the power of alienation during his minority is valid. *Id.*

**7. Validity of Residuary Clause.** A provision in a will that the residuary estate be divided "among testator's nephews and nieces" in the

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proportions which “the respective gifts made to them herein bear to each other” is not void for uncertainty, when such proportion is not impossible of ascertainment. *Leusk v. Richards.* 291

8. *Determination of the Proportion of Residue.* The earlier clauses of the will having given to the nephews and nieces (1) specific bequests of a specified amount; (2) bequests of a specified amount in trust with income to a life tenant, with remainder to such life tenant's children; (3) bequests in trust to those having no children, the principal upon the death of the life tenant to revert to the residuary estate, the principal of each trust created should be taken as the sum given upon which the amount of the proportion of the residue should be determined. *Id.*

9. *When Grandnephews Included Among Nephews.* Where the intention of the testator is evident, his grandnephews and grandnieces may be included among the nephews and nieces entitled to share in the residuary estate. *Id.*

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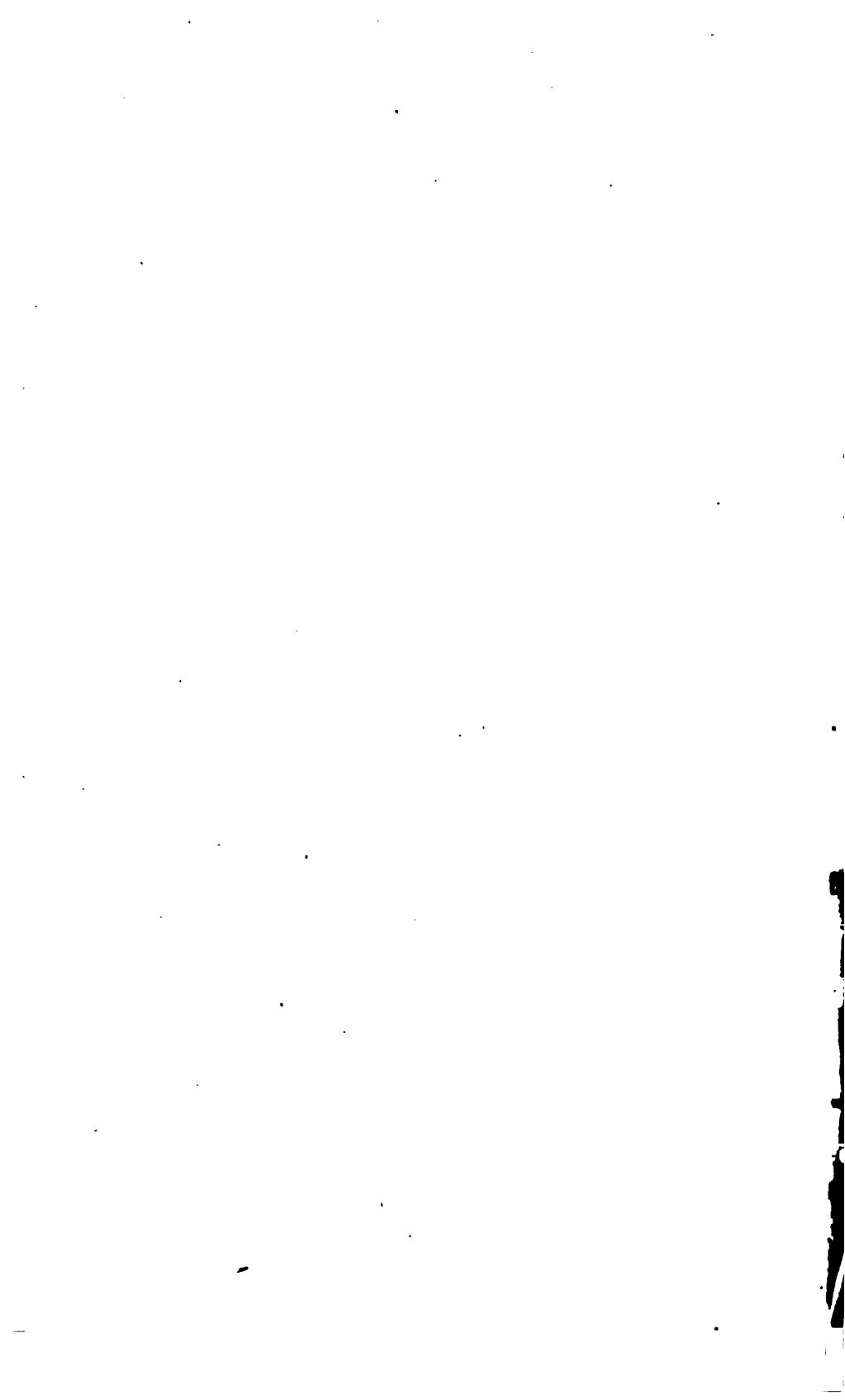
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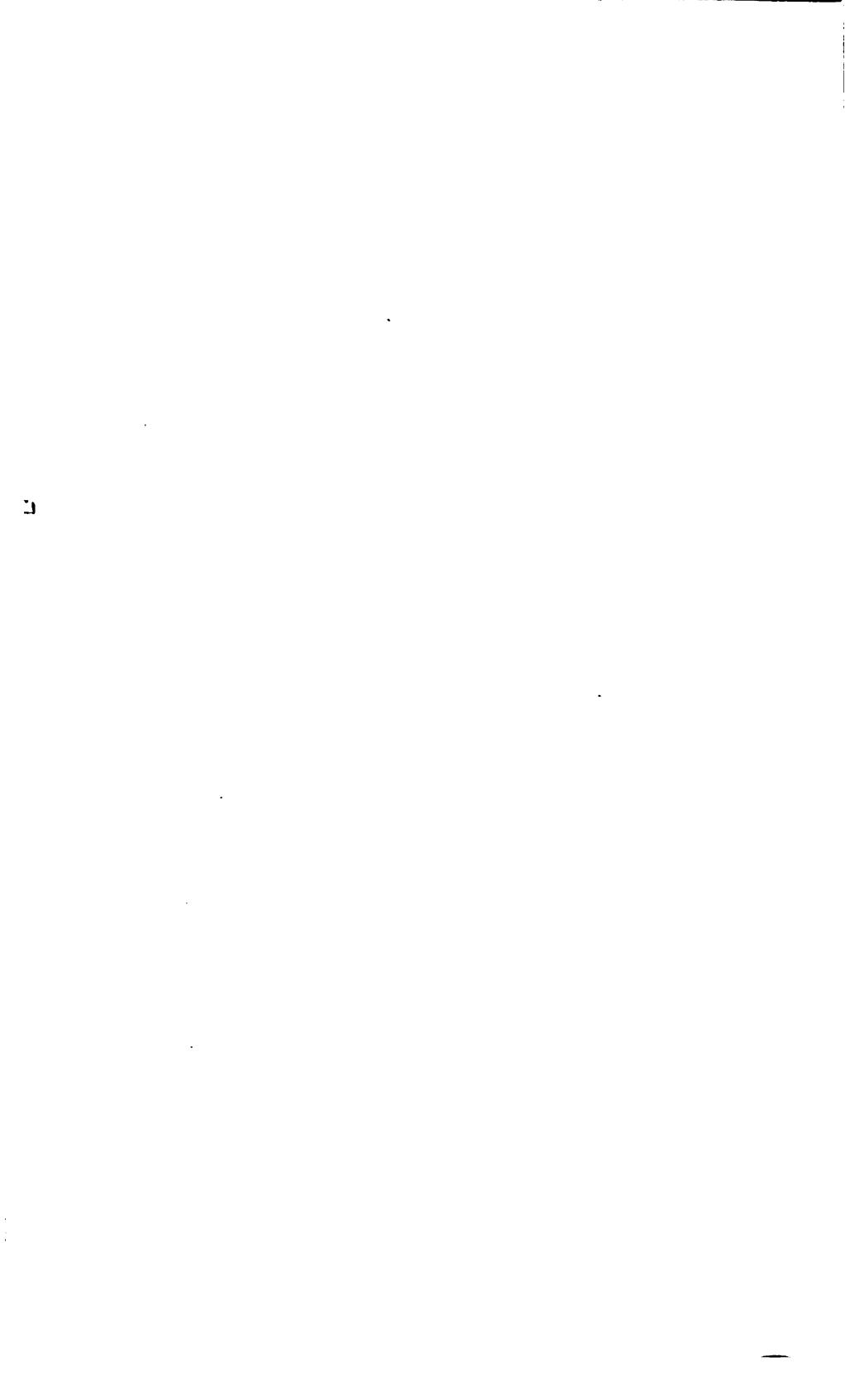
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